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86-575

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DOROTHY McCLELLAN,
Petitioner,

v.

STATE OF WEST VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF JEFFERSON COUNTY,
WEST VIRGINIA

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QUESTIONS PRESENTED

1. Whether petitioner's fundamental due process right to a fair trial was violated by the indiscriminate and unlimited admission of highly irrevelant, prejudicial and inflammatory testimony and by transgressions on her Fifth Amendment right to an independent grand jury.

2. Whether the Confrontation Clause of the Sixth Amendment requires the declarations of co-conspirators unavailable for cross-examination to bear certain indicia of reliability, and whether the conflict among the lower federal and the highest state courts on this issue should be resolved.

3. Whether expert witness testimony that a religious group's leader's practices brainwashed persons within the religious community and deprived them of freedom of thought and action can be admitted

consistent with the Free Exercise clause of the First Amendment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED ..	3
STATEMENT OF THE CASE	4
PRESENTATION OF FEDERAL QUESTION	14
REASONS FOR GRANTING THE WRIT	18
I. THE COURT CANNOT ALLOW THIS ABSOLUTE MOCKERY OF DUE PROCESS TO STAND	18
A. The Repeated Introduction Of Wholly Irrelevant And Highly Prejudicial Testimony Of Petitioner's And Others' Bad Acts Inflamed The Jury And Deprived Petitioner Of Her Essential Due Process Right To A Fair Trial ...	19
B. The Judge-Influenced Involuntary Manslaughter Indictment Violated Petitioner's Fifth Amendment Rights And Further Deprived Her Of Due Process Of Law	41

Page

II. THE TRIAL COURT'S FAILURE TO MAKE A PRE-ADMISSION DETERMINATON OF RELIABILITY OF THE DECLARATIONS OF ALLEGED CO-CONSPIRATORS UNAVAILABLE FOR CROSS-EXAMINATION DEPRIVED PETITIONER OF HER RIGHTS UNDER THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE 49

III. THE ADMISSION OF EXPERT TESTIMONY ON PETITIONER'S RELIGIOUS PRACTICES AND BELIEFS TO ATTAIN MIND CONTROL OVER OTHERS SERIOUSLY VIOLATED HER FIRST AMENDMENT RIGHTS 55

CONCLUSION

APPENDIX App-1

TABLE OF AUTHORITIES

Page

CASES

Behavior Research Institute, Inc. v. Leonard, No. 86E 0018-G1 (Mass. Probate & Family Court Department, Bristol County Div., June 4, 1986) 57

Boone v. Marshall, 760 F.2d 117 (6th Cir. 1985) 54

Carpenter v. Commonwealth, 186 Va. 851, 445 S.E.2d 419 (1974). 36

Commonwealth of Virginia v. Faith Mission Home, Case No. 53337-C (pending before the Circuit Court for the City of Charlottesville, Virginia) 57

Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C.Cir.), cert.denied, 396 U.S. 963 (1969) 63

Hawley v. State, 614 P.2d 1349 (Alaska 1980) 53

Katz v. Superior Court, 73 Cal.App.3d 952, 141 Cal. Rptr. 234 (1 Dist. 1977) 61, 62

Lee v. Illinois, 106 S.Ct. 2056 (1986) 50, 53 54, 55

Molko v. Holy Spirit Association for Unification, 224 Cal. Rptr. 817 (1 Dist. 1986) 60, 61 62, 63 64

Page

CASES (continued)

Offamano v. United States,
468 F.2d 269 (1st Cir. 1972),
cert.denied, 409 U.S. 1128 (1973).. 54

Ohio v. Roberts,
448 U.S. 56 (1980) 50, 51
53, 54

Olinger v. Commissioner of Internal
Revenue, 234 F.2d 823 (5th
Cir. 1956) 19

Pointer v. Texas,
380 U.S. 400 (1965) 55

Smith v. State Fire & Casualty Co.,
633 F.2d 401 (5th Cir. 1980) 37

State v. Butcher,
120 Ariz. 234, 585 P.2d 254
(1978) 53

State v. Nicholson,
252 S.E.2d 894 (W.Va. 1979) 31, 38
40

State v. Thomas,
203 S.E.2d 445 (W.Va. 1974) 31, 35
40

United States v. Angelilli,
660 F.2d 23 (2d Cir. 1981),
cert.denied, 455 U.S. 910 (1982).. 34

United States v. Ballard,
322 U.S. 78 (1944) 63

United States v. Callandra,
414 U.S. 338 (1974) 47

Page

CASES (continued)

United States v. DeLuna,
763 F.2d 897 (8th Cir. 1985) 53

United States v. Foskey,
636 F.2d 517 (D.C.Cir. 1980) 19, 31
38, 39
40

United States v. Gold,
470 F.Supp. 1436 (N.D.Ill. 1979).. 48

United States v. Graham,
548 F.2d 1306 (8th Cir. 1977),
cert.denied, 434 U.S. 825 (1977).. 47

United States v. Green,
648 F.2d 587 (9th Cir. 1981) 40

United States v. Hearst,
412 F.Supp. 893 (N.D.Cal. 1976),
affirmed, 563 F.2d 1331 (9th
Cir. 1977) 64

United States v. Horvath,
731 F.2d 557 (8th Cir. 1984) 35

United States v. Inadi,
106 S.Ct. 1121 (1986) 51

United States v. Koger,
646 F.2d 1194 (7th Cir. 1981) 19

United States v. Lebovitz,
669 F.2d 894 (3d Cir.), cert.
denied, 456 U.S. 929 (1982) 39

United States v. Mastrototaro,
455 F.2d 802 (4th Cir. 1972) 40

Page

CASES (continued)

United States v. Meyers,
550 F.2d 1036 (5th Cir. 1977),
cert.denied, 439 U.S. 847 (1978).. 19, 35

United States v. Molt,
758 F.2d 1178 (7th Cir. 1985) 54

United States v. Ordonez,
722 F.2d 530 (9th Cir. 1983) 53

United States v. Perez,
702 F.2d 33 (2d Cir. 1983),
cert.denied, 103 S.Ct. 2457
(1983) 53

United States v. Robinson,
700 F.2d 205, cert.denied, 104
S.Ct. 1003 (1983) 39

United States v. Samingo,
607 F.2d 877 (9th Cir. 1979) 47

VanSchaick v. Church of Scientology
of Cal., Inc., 535 F.Supp. 1125
(D.Mass. 1982) 63

Walker v. United States,
104 F.2d 465 (4th Cir. 1939) 37

Wood v. Georgia,
370 U.S. 375 (1962) 47

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... passim
U.S. Const. amend. V ..... passim
U.S. Const. amend. VI ..... passim
U.S. Const. amend. XIV, §1 ..... passim

Page

RULES

Rules of the Supreme Court, 21(h) .. 14
Fed. R. Evid. 403 ..... 31, 38
Fed. R. Evid. 404(b) 31, 33
34

OTHER

Weinstein, J. and M. Berger,
Weinstein's Evidence, §404(18)
(1985) 37
Wigmore, Evidence, §57 (3d Ed.
1940) 41
Wright, L. and K. Graham,
Federal Practice and Procedure:
Evidence, §5239 (1978) 34
59 Am.Jur.2d, Parent & Child, §24 .. 36

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PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF JEFFERSON COUNTY,
WEST VIRGINIA

Petitioner Dorothy McClellan respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Jefferson County, West Virginia, entered in the proceeding entitled State of West Virginia v. McClellan on March 1, 1985.

OPINIONS BELOW

There are no opinions, reported or unreported, pertaining to the judgment rendered below.

JURISDICTION

The judgment of the Circuit Court of Jefferson County, West Virginia was entered on March 1, 1985. Petitioner's Petition for Appeal to the Supreme Court of Appeals of West Virginia was denied on June 11, 1986. Petitioner's Motion for Reconsideration of the denial of her Petition for Appeal was denied on July 15, 1986, and her motion for a new trial on the basis of newly discovered evidence was denied on September 24, 1986. This Petition is filed within the time provided in the Order Extending Time to File Petition for Writ of Certiorari entered by Chief Justice Warren Burger on September 16, 1986 (No. A-197). Jurisdiction of this

Court to review the judgment of the Supreme Court of Appeals of West Virginia is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, §1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; ....

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; ....

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ....

STATEMENT OF THE CASE

Petitioner Dorothy McClellan was a resident of Stonegate, a cooperative living community in Jefferson County, West Virginia whose members held a common respect for a fundamental belief in God. The residents of the Stonegate community shared a large, twenty-seven room Victorian house set on a spacious tract along the Shenandoah River. While members of the Stonegate community all resided in the same large structure, each family within the community existed as a separate, autonomous unit. Each family had private rooms, its own possessions and furnishings, and children were raised solely by their parents. Stonegate residents worked in the Jefferson County community and the children attended Jefferson County public schools.

On October 5, 1982, two year old Joseph Green died from a spanking by his

parents, Stuart and Leslie Green. Leslie Green began spanking her son Joseph when he refused to apologize to another two year old after striking him. After a period of spanking, Stuart Green, Joseph's father, entered the room and continued to spank him with a paddle while both parents unsuccessfully tried to force Joseph to apologize to the other boy. After approximately two hours of intermittent spankings, petitioner, who had been out of the sight and sound of the room where the spanking was occurring throughout the two hour period, was summoned to the room by another. As soon as petitioner Dorothy McClellan arrived, she told Stuart Green to stop the paddling. Petitioner and others rendered first aid to Joseph, and he was later taken to a local hospital. Shortly thereafter Joseph Green died from shock and hemorrhaging.

On October 15, 1982, ten days after Joseph Green's death, a Jefferson County special grand jury indicted Stuart and Leslie Green for the misdemeanor charge of involuntary manslaughter in causing the death of their son, Joseph Green. Later that day the presiding judge of the Jefferson County Circuit Court, Pierre Dostert, instructed the Jefferson County Circuit Court Clerk, Ms. Rosa Lynch, to call him in Florida, where he was vacationing at the time. Recusal hearing tr. at 62. When Ms. Lynch called, Judge Dostert stated his dissatisfaction with the indictments and directed her to turn over the tapes of the special grand jury proceedings to his court reporter forthwith. Recusal hearing tr. at 67. In response to a subsequent written order by Judge Dostert, Ms. Lynch transferred the tapes of the grand jury proceedings to

Judge Dostert's secretary. Recusal hearing tr. at 68-69.

On October 31, 1982, Judge Dostert telephoned a member of the special grand jury, Ms. Pam Parziale, and told her that the grand jury had been improperly instructed, that it should have returned more severe indictments against Leslie and Stuart Green, and that it should be reconvened. Recusal hearing tr., pp. 27-28, 34-35, 38-41. See pp. 44-46, infra. Judge Dostert also inquired as to the names of the other grand jurors. These actions, and the complicated yet important pre-trial course of events that followed, set the tone for the proceeding below.

On June 8, 1983, the same special grand jury that indicted the Greens and was contacted by Judge Dostert indicted petitioner Dorothy McClellan for conspiracy to commit the unlawful wounding and

conspiracy to commit the voluntary manslaughter of Joseph Green, both felonies. (Indictment No. 83-F-44.) Following petitioner's motion to dismiss for, inter alia, failure to allege venue, this special grand jury was again reconvened and on August 1, 1983 returned venue-sufficient indictments on the conspiracy counts (Indictment No. 83-F-60.) The special grand jury also returned an additional indictment for involuntary manslaughter at that time. (Indictment No. 83-M-5.)

On August 3, 1983, petitioner moved to recuse Judge Dostert because of his intrusions into the special grand jury proceedings. Petitioner moved to dismiss her indictments for this, as well as other, reasons on August 7, 1983. As a result of the evidence brought out at the recusal hearing held August 9, 1983, Judge Dostert

was recused from all further matters pertaining to petitioner's case.

Despite the result of petitioner's recusal motion, on December 12, 1983 the Jefferson County Circuit Court denied petitioner McClellan's motion to dismiss the indictments returned against her.[1] On July 10, 1984, however, the Supreme Court of Appeals of West Virginia issued a Rule to Show Cause why a Writ of Prohibition against commencing petitioner's trial should not be awarded in light of Judge Dostert's improper interference with the special grand jury. Rather than respond to this Rule, on July 24, 1984 the State of West Virginia moved to dismiss petitioner's Petition for a Writ of Prohibition on

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[1]In the interim, petititioner's motion for change of venue due to extensive adverse pretrial publicity was granted and the case was transferred for trial purposes to the Circuit Court of Grant County, West Virginia.

mootness grounds, representing that it intended to reindict petitioner before a fresh grand jury.

On August 1, 1984, a new special grand jury was convened and petitioner was reindicted on the same charges: conspiracy to commit unlawful wounding, conspiracy to commit voluntary manslaughter, and involuntary manslaughter. (Indictment Nos. 84-F-58; 84-M-3.) Upon reindictment, the Supreme Court of Appeals of West Virginia granted the State's motion to dismiss because of mootness, discharged the Rule, and dismissed petitioner's Petition for a Writ of Prohibition. Thereafter, however, the State acknowledged that it could not proceed upon the involuntary manslaughter count (No. 84-M-3) because the misdemeanor statute of limitations had run. The State nevertheless continued to prosecute petitioner for involuntary manslaughter

under the indictment (No. 83-M-5) returned by the original special grand jury. Petitioner's second Petition for a Writ of Prohibition against trial on the misdemeanor count was denied by the West Virginia Supreme Court of Appeals.

From November 7, 1984 through November 10, 1984 petitioner Dorothy McClellan was tried by a jury in the Circuit Court of Grant County, West Virginia. The evidence at trial showed that Stonegate evolved out of petitioner Dorothy McClellan's desire to share her family's fundamentalist Christian way of life with others. From the early 1970's people, primarily young adults with family, drug, emotional or other problems, lived in the McClellan home and found it to be a place of spiritual and personal renewal. In 1974 the McClellans purchased the Stonegate property and turned it into a religion-based community. Over the next

decade, numerous families resided, worked and worshipped at Stonegate.

The State's theory of the case was that petitioner had brainwashed the adults residing at Stonegate into following her fundamentalist Christian beliefs and way of life, a central tenet of which was child obedience enforced, when necessary, by reasonable corporal punishment. The State's contention was that petitioner's expression of these beliefs made her a conspirator with the Greens in the beating death of their child, Joseph. The State argued that the conspiracy existed for the life of the community and encompassed all its members. For proof, the State elicited graphic testimony of select incidents over a ten-year period wherein persons other than petitioner employed harsh corporal punishment to discipline their or other children. Petitioner McClellan was not

involved in these incidents and they occurred not only prior to Joseph Green's birth but in some instances long after the persons involved had moved away from Stonegate. Nevertheless, this and other highly irrelevant and prejudicial testimony was repeatedly admitted, without limitation, over petitioner's objection. At the close of the State's case the Court dismissed the charge of conspiracy to commit voluntary manslaughter. The jury later returned a verdict finding petitioner guilty of involuntary manslaughter and conspiracy to commit the unlawful wounding of Joseph Green.

On March 1, 1985 petitioner was sentenced to not less than one and not more than five years in prison for the offense of conspiracy to commit unlawful wounding, and twelve months in jail for the offense of involuntary manslaughter. The sentences

are to run concurrently. Final judgment was entered on March 1, 1985. See App-2.

On June 11, 1986, petitioner's Petition for Appeal to the Supreme Court of Appeals of West Virginia was denied. Petitioner McClellan's Motion for Reconsideration of the denial of her Petition for Appeal was denied by this same court on July 15, 1986. See App-1. On September 24, 1986, the Jefferson County Circuit Court denied petitioner's motion for a new trial in light of newly discovered evidence.

PRESENTATION OF FEDERAL QUESTION PURSUANT TO SUP. CT. R. 21(h)

With respect to petitioner's Fourteenth Amendment claim that her fundamental right to a fair trial was denied by the repeated introduction of highly irrelevant and prejudicial testimony about the "bad acts" of petitioner and

others, petitioner's objection was initially raised during a hearing immediately pretrial. (Pretrial tr. pp. 17-18.) Petitioner's objection was renewed at the commencement of the second day of trial. Tr. 245-249. See Appendix at App-15 - App-22. This Fourteenth Amendment infirmity was a central point of petitioner's Petition for Appeal to the Supreme Court of Appeals of West Virginia. See Petition for Appeal, pp. 30-35.

Petitioner's claim under the Fifth and Fourteenth Amendments of the United States Constitution was urged upon the trial court in petitioner's motion to dismiss the second (venue-cured) indictments on August 3, 1983. Petitioner further raised this issue in her Petition for a Writ of Prohibition to the Supreme Court of Appeals of West Virginia when her motion to dismiss the indictment was denied. The grand jury

issue was further raised in petitioner's second Petition for a Writ of Prohibition to the West Virginia Supreme Court of Appeals. This point was also strenuously argued in petitioner's post-conviction appeal. See Petition for Appeal at 47-57 ("in arguing that Judge Dostert improperly intruded into the grand jury process, thus voiding the indictment, petitioner submits that the Fifth Amendment to the United States Constitution guarantees that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or an indictment of a grand jury'").

Petitioner's claim under the Sixth Amendment of the United States Constitution was raised during trial in the following colloquy:

> The Court: O.K. The witness is excused. (Whereupon, the witness was excused.)

> Mr. Askin: For the record, Your Honor, I would like to make sure that the Sixth Amendment confrontation issue is also preserved on the issue of what Mr. Price said.
>
> The Court: Sure.
>
> Mr. Askin: Thank You.

Trial tr. at 573.

This argument was also presented in detail in petitioner's appeal petition to the West Virginia Supreme Court of Appeals. See Petition for Appeal at 37-42 ("Petitioner says that in deciding whether this objected-to evidence was admissible against her, the Trial Court Judge should first have decided whether the declarants were unavailable and whether the statements have sufficient indicia of reliability").

Finally, the testimony of the State's expert witness, which forms the substance of the First Amendment question raised by petitioner, was objected to pretrial (pretrial hearing tr. pp. 10-11), during

trial (tr. pp. 611, 712, 728) and on appeal to the West Virginia Supreme Court (Petition for Appeal pp. 93-102).

REASONS FOR GRANTING THE WRIT

I. THE COURT CANNOT ALLOW THIS ABSOLUTE MOCKERY OF DUE PROCESS TO STAND.

It is with a clear recognition of the Court's function and resources that petitioner prays for a Writ of Certiorari to the Circuit Court of Jefferson County, West Virginia. Petitioner respectfully requests that the Court carefully review the egregious miscarriage of justice in the proceeding, State of West Virginia v. McClellan, so that it can correct, with all courts of the land as witness, this sham of justice and due process of law. The trial of this matter was so utterly devoid of the rudiments of a fair trial and due process that it cannot be allowed to stand, in its presently unreviewed state, as an example

of the American criminal justice system.

A. The Repeated Introduction Of Wholly Irrelevant And Highly Prejudicial Testimony Of Petitioner's And Others' Bad Acts Inflamed The Jury And Deprived Petitioner Of Her Essential Due Process Right To A Fair Trial.

"It is fundamental to American jurisprudence that 'a defendant must be tried for what [s]he did and not for who [s]he is.'" United States v. Foskey, 636 F.2d 517, 523 (D.C.Cir. 1980)(quoting United States v. Meyers, 550 F.2d 1036, 1044 (5th Cir. 1977), cert.denied, 439 U.S. 847 (1978)). Similarly, a case cannot be tried "too much on the theory of 'give a dog an ill name and hang him.'" United States v. Koger, 646 F.2d 1194, 1200 (7th Cir. 1981)(quoting Olinger v. Commissioner of Internal Revenue, 234 F.2d 823, 824 (5th Cir. 1956)). Petitioner was tried not for what she did but for who she was, and the prosecution's concerted effort to give petitioner an ill name resulted in her

conviction. Surely the highest court in the land cannot give its imprimatur to such a proceeding by denying certiorari.

Petitioner was indicted for conspiracy to commit unlawful wounding and voluntary manslaughter, and for involuntary manslaughter, as a result of the fatal spanking of Joseph Green by his parents. Joseph Green was two years old when he died in 1982. To prove its case the prosecution focused not on petitioner McClellan's conduct relating to the crime with which she was charged, but rather on irrelevant, yet highly prejudicial, bad acts primarily involving Stonegate residents other than petitioner during the years not just prior to Joseph Green's death, but prior to his birth as well. Consider the following trial testimony:

> Q. Will you please give the court and the jury your full name?
>
> A. Justine Arlowsky

* * *

Q. And was there a time that you lived at a commune known as Stonegate, in Jefferson County, West Virginia?

A. Yes, Sir.

Q. And when was it that you lived there -- to what period of time, roughly?

A. I moved in in 1972, and stayed there until '74 -- at the end of '74 and then we moved back in '77 and left in 1980.

Q. While you were there-- could you tell the jury whether or not you witnessed any exorcisms?

A. Yes, sir I did.

Q. Could you tell the jury the name of a person who's exorcism you witnessed?

A. Leslie Green.

Q. Could you tell the jury about when that happened?-- approximately what year?

A. Around '74, I think it was -- the end of the summer.

* * *

Q. Did you participate in any

exorcisms at Stonegate yourself?

A. In what respect?

Q. In any respect other than the one with Leslie.

A. Yes.

Q. Could you describe it to the jury?

A. Well, I was -- I had demons exorted out of me at one point.

Q. O.K. Could you tell the jury when this was?

A. This was '79, I believe-- somewhere in '79.

Q. Tell the jury what happened, please.

A. We had a meeting, and I was told that I had some demonic problems and that it was time that we dealt with them. And so we proceeded to have this exortation meeting -- this exorcism. And I didn't know what to do. So I had read previously to this some situations where supposedly people had this done to them and I acted one of them out, basically.

Tr. at 423-428.

Of a similarly irrelevant and highly prejudicial character was the following testimony elicited by the State from a different witness:

> Q. Was there anything that you observed Dorothy McClellan studying while you were at Stonegate that caused you any further discernment, or upset you?
>
> A. Yes. I didn't observe it, but one of the members of the . . . .
>
> Mr. Askin: Your Honor if he said he didn't observe it, then I'll object to hearsay.
>
> The Court: I'll overrule the objection.
>
> DIRECT EXAMINATION (Cont'd).
>
> Q. Let me ask you -- did Dorothy McClellan tell you that she was studying anything that would upset you?
>
> A. No, she didn't.
>
> Q. Describe what happened.
>
> A. During one of the times together with one of the group, when Dorothy was not there, one of the members mentioned that she was studying the Cabala, which was

> apparently -- I have never seen the thing -- but he said that this was a handbook on satanic practices.
>
> Mr. Askin: Judge, I'm going to move for a mistrial. That was inappropriate. That was hearsay. That's prejudicial. It's irrelevant. I move for a mistrial.

Tr. at 355-356.[2]

Much of the evidence introduced at trial over petitioner's objections involved physical discipline of children by persons other than petitioner McClellan, out of her

---

[2]Of almost equal importance is the trial court's response to petitioner's counsel's motion and objection:

> The Court: You move for a mistrial on the basis of that question?
>
> Mr. Askin: Yes, sir, I do.
>
> The Court: O.K. your motion is overruled.
>
> Mr. Askin: I asked -- Your Honor I will ask that the jury will be asked to disregard that and that it be stricken from the record.
>
> The Court: Overruled.

Id.

presence, at points in time entirely remote from the date of Joseph Green's death. A flagrant example is the testimony of prosecution witness Leah Ice:

> Q. Do you recall seeing any beatings of children while you were at Stonegate?
>
> A. Yes, I do. * * * I remember Sarah Jean laying on the floor and being beaten and beaten and beaten until she would stop screaming, which, of course, she couldn't do. And this, I took part in.
>
> Now this didn't happen at Stonegate; but it happened under the influence of Stonegate. I was living with Bobby and Marianne Price for a year.
>
> And Joann was a discipline problem. She didn't readily submit to anybody telling her what to do. Now, she was three (3) years old and was supposed to fix her bed. And I was told to make her fix her bed. And so I spanked her for fifteen (15) minutes myself, with a wooden paddle, for her -- to get her to fix a bed. This is what I had been taught at Stonegate. This is what Marianne had told me to do. Well, I got scared after

fifteen (15) minutes; and I called Bobby on the phone to ask him if I should continue. And he said no, not to, that he would take care of it when he got home.

But there was another incident under the same influence and the same place and this is where I had most of the dealings with the kids. I took care of Bobby and Marianne's kids while I was living with them. Marianne had beaten Joanne for half an hour, trying to get her to do something. I don't remember what but we actually closed the windows so no one would hear Joanne screaming because we didn't want the neighbors to get the wrong impression, because we were submitting to God, apparently. And we knew what we had to do, and that was to beat Joanne into submission, whatever way it took.

Q. Now, the first incident that you just described -- how long had it been since you were at Stonegate when this occurred?

A. Myself?

Q. Yes.

A. About six (6) months.

Q. Six (6) months after you had left the Stonegate

residence?

A. Right. Uh huh. Now Bobby and Marianne had been a couple of years, I believe. But she was still doing things she had been taught at Stonegate ....

Tr. at 405-407 (emphasis added).

Petitioner's quotation of yet another witness's testimony may convey to the Court the superabundance of irrevelant, prejudicial evidence of others' acts of harsh physical discipline that was admitted without review, limitation, or admonition.

Q. Now, can you describe any-- so that the jury will understand what you're saying -- instances -- the examples where you were exercising your paddle power? Did you have paddle power?

A. Yes, sir. I certainly did.

Q. Can you describe any instances when you were exercising it?

A. Yes. * * * And one instance was with the little boy and the other was with the little girl. One day, David had been very disruptive. And John [McClellan] saw that I was absolutely getting nowhere with him. He would not cry. He would not be obedient to

me. He would not listen to me. He had my husband and one of the other men -- and I can't remember who it was -- take David into the playroom, stand him up against the wall, facing the wall, spread-eagled his arms and held his hands in place. And they said, 'David, you're an expert at dancing away from Lou when she tries to hit you. Well, you're not going to dance away from her now. You're going to stand right there. Lou, hit him as hard as you can.' And I did.

And the other incident was with P.K. She was even more difficult to handle for me than David was. One day, John said, 'Lou, you do not hit them hard enough. Kids are a lot tougher than you think and a lot smarter. You really need to let them know that you mean it. You have got to gain their respect. You have got to win. You've got to show them that you're the winning authority. You're the one in control.'

MR. ASKIN: Judge, I would object. I believe that she's testifying about the defendant's husband. That would be improper.

THE COURT: Overruled ....

THE COURT: Just go ahead and testify ma'am. The objection was overruled.

A. (Cont'g) The reason I brought the incident up involving John was, he said, 'Lou, come with me.' And everyone came into the

> library. He said, 'I will show you how to paddle the proper way.' And he swung against her bottom, hitting just about dead center on her coccyx, the little piece of tailbone that sticks out. And it was an incredibly hard blow. And she did not flinch. She did not cry. She did not budge.
>
> But after it was over, she ran out and jumped on the swing at which point John said, 'Thank God, she's all right. I never, ever meant to hit her that hard.'

Testimony of Louise Price, at 537-540.

The foregoing testimony is graphic, emotion-stirring, and gruesome. It is also devoid of any reference or connection to petitioner Dorothy McClellan. Although it did little to prove the State's case, it did much to inflame the jury's passion.[3]

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[3]The trial transcript is perforated with irrelevant and prejudicial testimony in other subject areas. See, e.g., testimony by Louise Price that her husband had a relationship with his brother's wife (tr. at 530-531); testimony of Thomas Wahl that he had an intimate, extramarital relationship with petitioner (tr. at 1102). Additionally, the State's expert witnesses and the prosecutor made numerous references

By guiding admission of evidence, evidentiary rules help insure that a person's due process and fair trial rights are respected. Whether under the Federal Rules of Evidence or state statutory or common law evidentiary principles, the American courts are uniform in excluding not just irrelevant evidence, but relevant evidence the probative value of which is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. With the concept of due process as their common guide, evidentiary rules uniformly prohibit the admission of evidence of other crimes or "bad acts" where such evidence is used to show a person's character and that in the incident at issue she acted in conformity

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to Jonestown, cults and "commies" (see, e.g., tr. at 919) all to further incite the jury to return an emotion, rather than evidence, based verdict and effectively proving petitioner's guilt by association.

therewith. See, e.g., Fed. R. Evid. 404(b). Even when it is offered for a different purpose, however, such evidence cannot be admitted if its prejudicial effect overshadows its probative value. See e.g., Fed. R. Evid. 403; State v. Thomas, 203 S.E.2d 445 (W.Va. 1974).[4] As one circuit court has observed, "these rules were designed to ensure a defendant a fair and just trial based upon the evidence presented, not upon impermissible inferences of criminal predepositions or by confusion of the issues." United States v. Foskey, supra, 636 F.2d at 525.

At trial, an overwhelming amount of

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[4]West Virginia has now adopted the Model Rules of Evidence, which are substantially similar to the Federal Rules. At the time of petitioner's trial, West Virginia's evidentiary rules were not codified. West Virginia evidentiary law did, however, substantially conform to the Federal and Model Rules. See State v. Nicholson, 252 S.E. 2d 894 (W. Va. 1979); State v. Thomas, supra.

evidence was admitted about either petitioner's bad acts or unconventional conduct or the bad acts of others. Petitioner initially contends that much of the "evidence" admitted (e.g., testimony of exorcisms or interpersonal relations at Stonegate) was utterly irrelevant, highly inflammatory and created an atmosphere where the evidence of the crimes alleged became secondary.

To the extent any of the testimony cited above was relevant, it can be broken down as follows: evidence of petitioner's bad acts and evidence of the bad acts of others. The error in admitting the latter without any limiting instructions is patent.[5]

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[5]Petitioner was indicted for specifically "conspir[ing] with one Stuart Greene [sic] and Leslie Greene [sic] to commit the crime[s] of unlawful wounding to beat and discipline one Joseph Green" and for conspiring with these same persons to commit the crime of voluntary manslaughter

Defendant was not only charged with and convicted of a crime with which she was not involved, but was also tried for and convicted of the emotion-laden acts of others committed at remote times and places. As has been explained in the context of the relevant Federal Rules, "[w]hile Rule 404(b) is not limited to other acts of the defendant, proof of conduct of third persons does not normally

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of Joseph Green. In its Bill of Particulars, the State took the liberty of drawing the conspiracy with a much broader brush: "The defendant McClellan did conspire with all members of the commune ... to obtain submission of all infant children within the group" (emphasis added). Petitioner objected to this extension of the alleged conspiracy to practically unlimited bounds at trial and on appeal (see Appendix at App-17 - App-20; Petition for Appeal at 35), and maintains her objection before this Court. The State cannot so expansively redraw the scope of a conspiracy indictment in a Bill of Particulars and use this revised conspiracy to bootstrap into evidence the acts and/or statements of numerous additional persons over a lengthy period of time.

support a strong inference as to the character of the defendant [her]self." L. Wright and K. Graham, Federal Practice and Procedure: Evidence §5239 at 451 (1978). Further, "it would seem that conduct of third persons offered to prove the character of the accused would also be barred as evidence of the defendant's conduct." Id. at 458. See United States v. Angelilli, 660 F.2d 23 (2d Cir. 1981), cert.denied, 455 U.S. 910 (1982) (requiring limiting instruction so that others' acts not used to prove defendant acted in conformity therewith). Graphic testimony was admitted, indiscriminately and without limitation, of others' acts of corporal child punishment. Petitioner's right to a fair trial was destroyed in the process.

With respect to evidence of petitioner's bad acts specifically, and all bad acts evidence generally, four

requirements hold: (1) the evidence of a bad act must be admissible on a material issue raised; (2) the evidence must be similar in kind and reasonably close to the charge at trial; (3) the evidence of the other crime or bad act must be clear and convincing; and (4) the probative value of the evidence must not be outweighed by its prejudicial effect. See United States v. Horvath, 731 F.2d 557, 560 (8th Cir. 1984); United States v. Meyers, supra, 550 F.2d 1036. See also, State v. Thomas, supra, 203 S.E.2d 445.[6]

It is self-evident that the evidence of petitioner's bad acts -- her participation in exorcisms, one incident of her spanking her child, and her personal

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[6]These requirements, of course, presuppose the elementary principle that bad acts evidence is not admissible as proof of character to show that such person has acted in conformity therewith. See, e.g., Fed. R. Evid. 404(b).

relationships -- does not meet the foregoing requirements. Such evidence was highly dissimilar in kind to and was quite remote in time from the charge at trial[7].

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[7]The only testimony adduced at trial of petitioner McClellan spanking children was about one incident where petitioner spanked her son as he climbed the stairs to force him to get back into his room. There was no evidence that this incident was harmful, overextended, or otherwise ran afoul of the right of a parent to use reasonable means, including corporal punishment, to correct one's child. See, e.g., Carpenter v. Commonwealth, 186 Va. 851, 445 S.E.2d 419 (1974); See generally, 59 Am.Jur.2d, Parent and Child §24. The difference between this incident and the graphic testimony of the Greens' and other parents' acts of discipline was underscored by prosecution witness Thomas Wahl:

DIRECT EXAMINATION (CONT'D)

BY MR. HAMSTEAD:

Q. There's been testimony that there were no instances of extended beatings by the defendant at Stonegate. Could you tell the jury whether you have knowledge of any extended beatings by the defendant of a child?

* * *

A. The most prolonged spankings that

Similarity of offense and temporal proximity are central considerations. See e.g., Smith v. State Fire & Casualty Co., 633 F.2d 401 (5th Cir. 1980)(suit for failure to pay on fire insurance policy; not error to exclude evidence of four other fires that occurred on property owned by defendant as previous fires were not sufficiently similar in their circumstances nor near enough in time for their probative value to outweigh their prejudicial effect); Walker v. United States, 104 F.2d 465, 469-470 (4th Cir. 1939); see generally J. Weinstein and M. Berger, Weinstein's Evidence, §404(18)(1985). The final test in a bad acts admissibility inquiry, instantiating the due process right to a

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> I recall were usually by the individual parents. I don't recall.

Tr. at 1110.

fair trial, is whether the evidence's probative value sufficiently counterbalances its prejudicial effect. See United States v. Foskey, supra; Fed. R. Evid. 403. The trial court made absolutely no effort to undertake the requisite balancing of probative versus prejudicial value. It denied petitioner's motion for in camera review of the bad acts testimony and simply granted her a standing objection to all evidence that later came in, sight unseen. Tr. at 246; see Appendix at App-17. This is totally violative of petitioner's due process rights and, not surprisingly, is in stark contrast to West Virginia law. See State v. Nicholson, 252 S.E.2d 894 ("the trial court should require the state to disclose in advance, in camera, any evidence of collateral crimes it intends to introduce at the trial. This disclosure is designed to permit the court

to make [a] determination relative to the probative value of such evidence").[8] See also, United States v. Foskey, supra, 636 F.2d at 523 (suggesting pretrial procedure for determination of admissibility).

More fatal to petitioner's due process rights, however, was the fact that the jury was in no way and at no time instructed that the evidence of allegedly satanic practices, adulterous relationships, ways in which petitioner ran affairs at Stonegate, or other child discipline incidents with which petitioner had no involvement, was not to be considered as evidence establishing petitioner's guilt of

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[8]Other courts have set forth an intermediate requirement that the trial court set forth its balancing equation so that it can be properly reviewed upon appeal. See United States v. Robinson, 700 F.2d 205, cert.denied, 104 S.Ct. 1003 (1983); United States v. Lebovitz, 669 F.2d 894, 901 (3rd Cir.) cert.denied, 456 U.S. 929 (1982). As the open-door admission of evidence at trial suggests, this standard was not even approached in the case at bar.

the crimes for which she was charged as a result of Joseph Green's death. See tr. at 1126-1143 (Jury Charge). Limiting instructions, both at the time of admission of the evidence and during the jury charge, are crucial in protecting a criminal defendant's due process and fair trial rights. See United States v. Green, 648 F.2d 587, 593 (9th Cir. 1981)(citing cases); State v. Nicholson, supra, 252 S.E.2d at 898.[9]

At the root of a person's right not to be deprived of liberty without due process of law is the fundamental right to a fair trial. A trial cannot be fair when the

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[9]The error below does not lie solely with the trial court. The prosecutor has "a large measure of responsibility" to independently weigh the evidence, Foskey, supra, 636 F.2d at 526, and avoid "prejudic[ing] the accused by the excessive employment or 'shotgunning' of [bad acts evidence]." Thomas, supra, 203 S.E.2d at 456. See also United States v. Mastrototaro, 455 F.2d 802, 804 (4th Cir. 1972).

evidence offered and admitted therein does not prove the charge but incites the passions. It is the function of due process to control "the deep tendency of human nature to punish, not because our [defendant] is guilty this time, but because [s]he is a bad [wo]man and may as well be condemned now ...." Wigmore, Evidence §57 at 456 (3d Ed. 1940). The trial court utterly failed to control the inflow of evidence catering to this deep tendency and petitioner was denied a fair trial of the specific crimes for which she was charged. The Court's supervisory powers are needed to correct this substantial due process violation.

B. The Judge-Influenced Involuntary Manslaughter Indictment Violated Petitioner's Fifth Amendment Rights And Further Deprived Her Of Due Process Of Law.

Petitioner's indictment for and conviction of involuntary manslaughter was

premised upon the State's theory that petitioner had a duty to seek and render medical aid to Joseph Green. The indictment for this offense, however, was obtained after blatant interference in the grand jury process by the presiding Jefferson County Circuit Judge. This intrusion did not merely violate petitioner's Fifth Amendment rights. Had this indictment been subjected to the requirements of the Fifth Amendment, arguments would not have been made to the jury that petitioner owed and breached a duty to seek and render medical aid to Joseph Green. These arguments, and any evidence in support thereof, further tugged at the jury's emotions and exacerbated the due process infirmities delineated above.

As the Statement of the Case describes, the indictments herein underwent a peculiar evolution. Ten days after

Joseph Green's death, a Jefferson County Special Grand Jury indicted Stuart and Leslie Green for involuntary manslaughter. Judge Dostert, Presiding Judge of the Jefferson County Circuit Court, was on vacation at the time of the special grand jury's deliberations. As much of the Jefferson County populace, Judge Dostert was disappointed by the leniency of the indictments. On the day the indictments were handed down, he spoke with the Jefferson County Circuit Court Clerk from out of town and directed her to return the tapes of the grand jury proceedings to the stenographer so that he could review the instructions. Several days later Judge Dostert telephoned a member of the grand jury, Ms. Pam Parziale, and discussed with her the grand jury's instructions and procedures. Ms. Parziale testified about this conversation at a hearing on

petitioner's Motion to Recuse Judge Dostert from presiding over her trial:

Q. I would like to ask you to think back to the month of October, 1982. I would like to ask you if you had a conversation, either in person or by telephone, with the gentlemen seated down at your immediate left?

A. Yes. Judge Dostert called me on October 31 ....

* * *

Q. Did the person you were speaking with identify himself?

A. Yes.

Q. What did the person say?

A. He said it was Judge Dostert.

* * *

Q. Confining ourselves only to that case that you considered and the conversation with Judge Dostert, relate what Judge Dostert said to you, if anything, about your work as a grand juror in that case?

A. This was some time ago. I would say that the gist of the conversation centered around instructions given to the grand jury. The discussion, what a prudent man would do in a certain instance.

* * *

Q. Miss Parziale, did Judge Dostert

comment to you about whether, in his opinion, you had been properly instructed or improperly instructed by Judge Taylor?

A. Yes, he did.

Q. What did he tell you?

A. He felt that we had been improperly instructed.

Q. Did he discuss in what way you had been given improper instructions?

A. He thought that there should have been greater emphasis on what a prudent man would do in a given situation and we discussed that. As a matter of fact, I said I agreed with him, but that we didn't ... I said, we don't always get what we want, that there isn't always unanimity of opinion. And I felt that justice had been done. That we had rendered a very unpopular decision in the community and we were aware of that. But, the way the law was written that we had done ... that we felt justice had been served. And that if there was any disagreement, then it was the law that should be changed, and subsequently I have spoken with my legislator.

Q. What was his comment, if any, that you recall him making in response to that statement?

A. That's when he explained that there is the possibility that a grand juror could poll other grand jurors and ask them to be

reconvened. I don't, even to this day, know the names of all the grand jurors, and I reiterated to him that even though I was sympathetic to his concern, I felt that justice had been done.

Q. What concern were you sympathetic to?

A. He felt that ...

Q. Who's he; Judge Dostert?

A. ... that involuntary manslaughter was insufficient.

Transcript of Recusal Hearing, pp. 22-24, 27-28, 34-35.

The same special grand jury that Judge Dostert lobbied after the Green indictments later indicted petitioner Dorothy McClellan on two felony counts. Petitioner moved to dismiss these indictments due to Judge Dostert's improper influence. The West Virginia Supreme Court of Appeals recognized the impropriety and issued a Rule to Show Cause why a Writ of Prohibition against a trial on these indictments should not issue. As is described in petitioner's Statement of the

Case, supra at 9, the State moved to dismiss this Rule as moot because of its reindictment of petitioner, which motion was granted. However, the State proceeded through trial on the tainted misdemeanor indictment when petitioner raised a statute of limitations objection which the State conceded was valid.

A grand jury has "ancient and solemn responsibilities." United States v. Samingo, 607 F.2d 877 (9th Cir. 1979), citing United States v. Calandra, 414 U.S. 338 (1974). These responsibilities can only be executed if the grand jury is independent and informed. See Wood v. Georgia, 370 U.S. 375 (1962). "[U]nder the Constitutional scheme, the grand jury is not and should not be captive to any of the three branches." United States v. Graham, 548 F.2d 1306 (9th Cir. 1977), cert. denied, 434 U.S. 825 (1977). A grand

jury's essential purpose of protecting citizens from unfounded criminal prosecution necessitates that a grand jury act independently of both the prosecuting attorney and judge and that it be independent and informed. See United States v. Gold, 470 F.Supp. 1436 (N.D.Ill. 1979). Obviously, the pre-constitutional requirement of an independent grand jury, incorporated into the United States Constitution by the Fifth Amendment, has been violated by Judge Dostert's actions and petitioner has been substantially deprived of her right to an independent grand jury.

This constitutional violation overflows into the due process area. Had the tainted involuntary manslaughter indictment been dismissed, the jury would not have heard the State's vigorous arguments that petitioner owed and breached

a duty to seek and render medical aid to the decedent Joseph Green. See tr. at 1163-64, 1187. The State's repeated references to petitioner's criminal negligence in this respect plainly had a prejudicial effect upon petitioner and could not be separated out from the jury's consideration of the unlawful wounding charge. Judge Dostert's actions violated petitioner's Fifth Amendment right to an independent grand jury, and the state court's failure to dismiss the tainted indictment caused a substantial deprivation of petitioner's due process right to a fair trial. These constitutional errors, as yet unreviewed, demand this Court's scrutiny.

II. THE TRIAL COURT'S FAILURE TO MAKE A PRE-ADMISSION DETERMINATION OF RELIABILITY OF THE DECLARATIONS OF ALLEGED CO-CONSPIRATORS UNAVAILABLE FOR CROSS-EXAMINATION DEPRIVED PETITIONER OF HER RIGHTS UNDER THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE.

In Ohio v. Roberts, 448 U.S. 56 (1980), this Court held, "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is only admissible if it bears adequate 'indicia of reliability.'" The Court's recent decision in Lee v. Illinois, 106 S.Ct. 2056 (1986), strongly reaffirmed the constitutional requirement that extra-judicial declarations bear adequate indicia of reliability before being admitted into evidence. Serious reliability problems permeated the admission at trial of declarations of co-conspirators unavailable for cross-examination. Petitioner's Confrontation Clause rights, as enunciated by Roberts and, most recently, Lee, were thus seriously violated.

Certiorari is appropriate for a

further reason. In United States v. Inadi, 106 S.Ct. 1121 (1986), the Court ruled that the Confrontation Clause does not require a showing of the declarant's unavailability as a prerequisite to the admission of his extra-judicial declarations. Inadi left unresolved, however, the issue as to whether co-conspirator declarations can be admitted without the "indicia of reliability" which Roberts, and now Lee, found to be demanded by the Confrontation Clause. A sharp conflict exists amongst the lower federal courts and the highest state courts on this issue. In light of the Court's recent reaffirmation of the requirement of reliability, this conflict should be resolved and petitioner's Sixth Amendment deprivation should be redressed.

At petitioner's trial, several alleged co-conspirators' declarations were admitted without any inquiry into their reliability.

The testimony of Louise Price, quoted at 27-29, supra, provides one example.

George Price's statement, admitted into evidence through Ms. Jan Adams, provides another:

> Q. Did you have occasion to ever discuss with George Price or hear him discuss with you or say anything to you with regard to his opinion on the legality of the beating death of Joey Green?
>
> A. Mr. Price and I were discussing the situation. It was December 15. We had been doing some interviews with Stonegate residents. This was at the Mental Center in Ranson near Charles Town.
>
> Mr. Price and I were talking about the situation. He was questioning the Department of Human Services' involvement and I was trying to explain to him that any time a child is beaten, we are involved by law. He said, 'But we -- I would see where you would consider this abuse anywhere else -- but not at Stonegate.'

Tr. at 571-572. The State made full use of this alleged co-conspirator declaration in its closing argument. See tr. at 1152-1153.

The foregoing declarations were admitted against petitioner Dorothy McClellan without any cross-examination--confrontion -- of the declarants. Numerous courts have declared, in light of Roberts, that particular indicia of reliability must be present before a co-conspirator's declarations can be substantively admitted. See, e.g., United States v. DeLuna, 763 F.2d 897 (8th Cir. 1985); United States v. Ordonez, 722 F.2d 530, 535 (9th Cir. 1983); United States v. Perez, 702 F.2d 33 (2d Cir.) cert.denied, 462 U.S. 1108 (1983).[10] This would appear to be the prevailing view in light of Lee.

Other federal courts, however, have ruled that co-conspirator declarations, by

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[10]Several state courts impose a similar precondition upon the admission of declarations of co-conspirators not testifying at trial. See, e.g., State v. Butcher, 120 Ariz. 234, 585 P.2d 254 (1978); Hawley v. State, 614 P.2d 1349 (Alaska 1980).

their nature, automatically satisfy the requirements of the Sixth Amendment. See Boone v. Marshall, 760 F.2d 117, 119 (6th Cir. 1985); United States v. Molt, 758 F.2d 1178 (7th Cir. 1985); Offomano v. United States, 468 F.2d 269, 273 (1st Cir. 1972), cert.denied, 409 U.S. 1128 (1973). Significant disagreement on this issue thus exists below.

Petitioner McClellan submits that the trial court's reflexive admission, without requiring any proof of reliability, of the out-of-court declarations of purported conspirators violated the principles of Roberts, Lee, and the Sixth Amendment's Confrontation Clause. As the Court again observed just last term,

> [t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Lee, supra, 39 Crim. L. Rptr. at 3124 (quoting Pointer v. Texas, 380 U.S. 400, 405 (1965)).

The denial of this right in petitioner's trial, and the sharply conflicting decisions on this point below, warrant granting a writ of certiorari to the Circuit Court of Jefferson County, West Virginia.

III. THE ADMISSION OF EXPERT TESTIMONY ON PETITIONER'S RELIGIOUS PRACTICES AND BELIEFS TO ATTAIN MIND CONTROL OVER STONEGATE RESIDENTS SERIOUSLY VIOLATED HER FIRST AMENDMENT RIGHTS.

The State's theory of the prosecution of petitioner for the death of Joseph Green as a result of the brutal spanking he received at the hands of his parents was that petitioner was responsible for Stuart and Leslie Greens' acts, and Joseph's death, because it was her religious beliefs, and her domination over the free will of the Greens, that caused them to act

as they did. The contention that petitioner could be responsible for the Greens' acts because her religious indoctrination of them destroyed their free will is wholly repugnant to the Constitutional guarantee of the free exercise of religion. This Court should now firmly declare that the pursuit of this liberty cannot be the basis of a criminal prosecution.

At trial, the State called Dr. Richard Ofshe, a professor of sociology, and Dr. Margaret Singer, a clinical psychologist, to testify as expert witnesses. On the basis of their joint interviews of a limited number of dissenting, former residents of Stonegate, Drs. Ofshe and Singer opined that through mind control techniques petitioner deprived Stuart and Leslie Green, and other Stonegate residents, of their free will and forced

them to follow her religious precepts, including the central tenet of child discipline.[11]

Child discipline as a Biblical or religious command, or as a form of behavorial therapy, has raised difficult legal issues. See, e.g., Behavior Research Institute, Inc. v. Leonard, No. 86E 0018-G1 (Mass. Probate and Family Court Department, Bristol County Division, June 4, 1986) (permitting use of aversive techniques); Commonwealth of Virginia v. Faith Mission Home, No. 53337-C (pending before the Circuit Court for the City of Charlottesville, Virginia). These are not the First Amendment issues presented here, however. Petitioner was tried not for disciplining Joseph Green, but for advocating a system

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[11]Of course, Drs. Ofshe and Singer were well aware that this tenet in no way called for the brutal spankings graphically testified to by the State's witnesses and not involving petitioner.

of religious beliefs, including child discipline, in such a way as to deprive other Stonegate residents, including Stuart and Leslie Green, of their free will and freedom of action. Dr. Singer's testimony makes this most clear:

Q. Can you tell the jury whether or not the principles that you've described would work in the enforcement of an agreement on child discipline?

A. Yes. The social structure that Mrs. McClellan had set up in which she had these people dependent on her socially, psychologically, financially, emotionally -- she had total control to the extent that one person with a group of that size can control it. She then got these people dependent on her in those various ways.

* * *

Q. Okay. Can you tell the jury whether or not, listening to those tapes, you are able to describe for the jury the forthrightness of Stuart Green? What phase was he in coming out of the group at the time that he gave the interview to Dr. Ofshe?

A. I can't answer that based upon my experience with these many hundreds I've worked with. My

feeling was, from listening to the tape, that Stuart Green isn't all the way out of the domination of Mrs. McClellan and the system that she had enforced at the Stonegate organization.

* * *

Q. Can you tell the jury, with a reasonable degree of certainty in your field and training, whether or not you can offer an opinion as to phase of coming out that Leslie Green was, based on her testimony here today?

A. Yes.

Q. What is that opinion?

A. My opinion is that Mrs. Green is not all the way out of the domination and control ....

* * *

Q. Were you able to find out the manner in which the Divine was utilized after the group was developed? You've already, I believe, described something at the time it was formed. After it was developed, how was it used?

A. After the group was organized, Mrs. McClellan conveyed to the people that she was, in a way, as some of them expressed it, their pipeline to God and that she would convey to them what God wanted the group to do. But the group moved more and more away from the Bible study and that type of enterprise which had been visible when it first began. It

moved more and more into the group carrying out her personal desires and her personal plans but with her using the role of saying that she got special messages, so to speak. It was her way of using religion or religious concepts to get the group to carry out her will.

Tr. at 720-724.

Dr. Ofshe's testimony had a similar theme:

Q. You were asked about Jonestown. Can you tell this jury whether there are parallelisms on the question of mind control, thought control, manipulation of group behavior between Jonestown--what happened there -- and Stonegate? . . .

A. There are parallels in the sense that peer pressure, influence, coercion, the constant undercutting of people's sense of reality and sense of themselves are the basic techniques that are used to gain control of a group of individuals and to lead people to become deployable. By deployable, I mean simply following a leader's instruction with little or no resistance.

Tr. at 695-96.

As described in a recent California decision,

> [i]n Katz v. Superior Court, 73 Cal. App. 3d 952 (1977), the Court of Appeals was confronted with the testimony of a psychiatrist and a psychologist, very similiar to that presented here, seeking to establish that the Unification Church engaged in 'coercive persuasion' or'brainwashing' to gain the allegiance of recruits to the Church. In that case, parents of five young adult members of the Church had obtained orders from the superior court appointing them temporary conservators of the persons of their children. The parents contended their children had been subjected to 'coercive persuasion' through methods such as 'food deprivation; sleep deprivation; isolation; the use of fear tactics; the use of guilt feelings; and indoctrination.' (Id. at p. 972). The Katz court was unwilling to inquire into the merits of these assertions, reasoning that '[w]hen the court is asked to determine whether that charge was induced by faith or by coercive persuasion is it not in turn investigating and questioning the validity of that faith? '

Molko v. Holy Spirit Association for Unification, 224 Cal. Rptr. 817 (1 Dist. 1986).

Molko was a similar case brought by former member of the Unification Church for fraud, false imprisonment and other torts.

The crucial issue there, as it is here, was "whether, consistent with the free exercise clause of the First Amendment, the indoctrination methods of the Unification Church (described in Katz as 'coercive persuasion' and here as the 'systematic manipulation of social influences') may be the subject of judicial scrutiny." 224 Cal. Rptr. at 234.

The Molko court's answer, which should be endorsed by the Court, provides the basis of petitioner's First Amendment contention:

> It would be entirely possible for a trial court to accept the view of Dr. Singer and Dr. Benson that Molko and Leal did not willingly submit to the religious teachings of the Unification Church because the psychological techniques of the Church deprived them of the ability to reason critically and make independent judgments, and to conclude, accordingly, that there is a triable issue of fact in this regard; but it would not be possible for a trial court to reach this result without questioning the authenticity and the force of the Unification Church's religious teachings and

permitting a jury to do likewise, which is constitutionally forbidden. (United States v. Ballard, supra, 322 U.S. 78, 87; Founding Church of Scientology v. United States, (D.C.Cir. 1969) 409 F.2d 1146, 1159, cert.den., 396 U.S. 963; VanSchaick v. Church of Scientology of Cal., Inc., (D.Mass. 1982) 535 F.Supp. 1125, 1142-1145.) The idea that religious doctrine can be (or, as some would have it, invariably is) manipulatively employed to subvert reason -- which, it may be noted, is an idea that has been used to condemn all religions as deceptively exploitive of certain universal human needs (see, e.g., Freud, The Future of an Illusion (1927)) -- is one we may entertain as individuals but which the First Amendment forbids us to consider as judges. Embodied in this constitutional prohibition is not simply a recognition of the value of the religious sensibility in its inevitably diverse and often conflicting forms, but as well an acknowledgement of the powerlessness of reason, and therefore the powerlessness of the law, to compass the mystery of religious faith .... Thus, from the point of view of the law, the opinions of plaintiffs' experts are neither true nor false. As the trial court observed, these opinions are simply 'veiled value judgments concerning the entire outlook of the Unification Church.'

Molko, 224 Cal. Rptr. at 817.[12]

The testimony of Drs. Ofshe and Singer was similiarly a veiled value judgment concerning the entire outlook of Stonegate and petitioner McClellan. By introducing expert evidence that petitoner's religious beliefs and methods of inculcation deprived the Greens of their free will and independence of thought and action, the State transgressed upon an area cordoned off by the Constitution. This Court should grant certiorari and affirm the integrity of the First Amendent in this area of practice.

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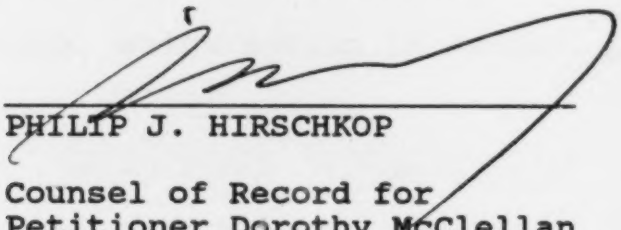
[12]The Dr. Singer whose testimony was thus stricken on First Amendment grounds was the same Dr. Margaret Singer who testified in petitioner's trial that petitioner McClellan exerted domination and control over the Greens and other Stonegate residents. Dr. Singer's "expert" testimony has been disregarded by other Courts as well. See United States v. Hearst, 412 F.Supp. 893 (N.D.Cal. 1976), affirmed, 563 F.2d 1331 (9th Cir. 1977).

CONCLUSION

The Court must act in its supervisory capacity to reverse the travesty of justice, and complete denial of due process, below. It should also resolve the split in the courts on an important aspect of an accused's constitutional right to confront the witnesses against her, and provide guidance on an important, unaddressed freedom of religion issue. For the reasons set forth, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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Petitioner Dorothy McClellan

October, 1986

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme court of Appeals continued and held at Charleston, Kanawha County on the 15th day of July, 1986, the following order was made and entered, to-wit:

State of West Virginia

vs.

Dorothy McClellan

On a former day, to-wit, July 14, 1986, came the petitioner, Dorothy McClellan, by Askin, Pill, Scales & Burke, and Steven M. Askin, her attorneys, and presented to the Court her motion in writing to reconsider her Petition for Appeal out of time, which motion is denied.

A True Copy

Attest: /S/
Clerk Supreme Court of Appeals

IN THE CIRCUIT COURT OF JEFFERSON COUNTY,
WEST VIRGINIA

STATE OF WEST VIRGINIA

Criminal Action No. 84-F-58
83-M-5

DOROTHY McCLELLAN,
Defendant

O R D E R

THIS MATTER came on to be heard this 1st day of March, 1985, upon the papers and proceedings formally read and had herein; upon the conviction of the Defendant, Dorothy McClellan, at trial on November 10, 1984, by jury verdict for the offense of Involuntary Manslaughter, a misdemeanor as charged in the indictment; and upon the conviction of the Defendant, Dorothy McClellan, at trial by jury verdict for the offense of Conspiracy to Commit Unlawful Wounding, a felony, as charged in the indictment; upon the Defendant's Motion for

a New Trial, To Arrest Judgment and to Set Aside the Jury Verdict filed herein; upon the State's Objection to said Motion filed herein; upon the appearance of the State of West Virginia by Michael D. Thompson Prosecuting Attorney; upon the appearance of the Defendant, Dorothy McClellan, in person and by Steven M. Askin, Esq., her attorney; upon the argument of counsel as to the matters raised in said Motion and in said Objection thereto.

In consideration of all of which, Defendant's Motion for a New Trial, to Arrest Judgment and Set Aside the Jury Verdict is hereby ORDERED denied for the reasons set forth by the Court upon the record, to which the Defendant objects and excepts.

WHEREUPON the court took up the matter of sentencing of the defendant, Dorothy

McClellan, upon her conviction for the crimes of Involuntary Manslaughter and Conspiracy to Commit Unlawful Wounding; upon the Motion of the Defendant to continue this hearing pending the filing of a Victim Impact Statement, which Motion is by the Court ORDERED denied in that the victim of the crime for which the Defendant stands convicted is deceased and that the parents of said victim were implicated in causing his death, and because the Court does not believe the legislature contemplated the requirement of filing a Victim Impact Statement under these facts; upon the Pre-Sentence Report prepared by Krista Curry, Probation Officer, a copy of which is ORDERED filed and sealed; upon the Court inquiring of the Defendant and her counsel as to whether they disagreed with any of the information set forth in the pre-sentence report provided to them; upon

the Court paraphrasing the recommendation of the Probation Officer, which recommendations are by law deleted from the copies of said report provided to the Prosecuting Attorney and to the Defendant, Dorothy McClellan; upon the Court relating to counsel that part of the recommendation which included a community sentiment statement which the Court paraphrased indicating that community sentiment was adverse to the Defendant; upon the Court inquiring of the Defendant and her counsel as to whether there was further evidence which they desired the Court to consider before sentence was pronounced; upon the proffer by counsel for the Defendant of the report prepared by David W. O'Connor of the National Center on Institutions and Alternatives, entitled "A Client Specific Planning Proposal for Dorothy McClellan," dated February, 1985; upon the proffer by

counsel for the Defendant of eighteen letters from persons living in Jefferson County concerning the sentencing of the Defendant, Dorothy McClellan, which report and letters are by the Court ORDERED filed; upon the request by counsel for the Defendant that the names of those persons contacted by the Probation Officer to determine community sentiment be disclosed, to which disclosure the State of West Virginia objected, and in consideration of all of which the Defendant's request for said disclosure of these names is ORDERED denied for the reasons stated upon the record, to which denial the Defendant objects and excepts; upon inquiry by the Court as to whether the Defendant, Dorothy McClellan, desired to have the report of NCIA prepared by David W. O'Connor and the eighteen letters sealed, to which inquiry Defendant's counsel indicated that he did

not wish said report or letters sealed; upon the inquiry by the Court of Defendant's counsel as to whether he had other evidence to offer; upon the arguments of counsel; upon the oral statement of the Defendant addressed to the Court.

In consideration of all of which the Court doth find that the Defendant, Dorothy McClellan, stands convicted of two offenses: Conspiracy to Commit Unlawful Wounding, a felony, which carries a maximum sentence of not less than one nor more than five years' incarceration in the penitentiary and a fine of up to $10,000.00; and Involuntary Manslaughter, a misdemeanor, which is punishable by confinement in the County Jail for up to one year and a fine not to exceed $1,000.00.

In determining the sentence in this case, the Court reviewed and considered (1)

pre-sentence investigation compiled by the Department of Corrections; (2) the additional unsolicited letters of support for the Defendant, which came from this community and elsewhere and from a variety, but primarily professional,group; (3) the alternative sentencing proposal submitted on behalf of the Defendant by the National Center on Institutions and Alternatives; (4) all evidence adduced at the trial of this case on November 7-10, 1984; and (5) all matters raised and evidence adduced (regarding sentencing) on this date.

In the Court's opinion, this is not a proper case for either direct probation or alternative sentencing; and accordingly, the Court denies the Defendant's Motions in that regard, and the Court's reasons for so denying as are follows:

1. The Court obviously considered both the recommendation of the State of

West Virginia and this Court's Probation Officer, a member of the Department of Corrections. Both are opposed to these alternatives, the State recommending the maximum sentence on each count, and the Probation Officer recommending one year in the County Jail and the maximum fines allowable under both convictions.

2. The Court believes the general community sentiment as set forth in the probation report to favor incarceration of the Defendant. The Court would add that most of the letters received supporting the Defendant came from people who were personal acquaintances of the Defendant or her family through either school, social or business contacts.

3. It is the Court's opinion that the offenses of which the Defendant stands convicted are so grave that neither direct probation nor probation under terms of

alternative sentencing would be just...nor would they serve the ends of what the Court perceives to be justice in a case of this nature involving crimes such as these; and

4. Of those responsible for the death of the young boy, Joseph Green, the Defendant, Dorothy McClellan, is most culpable. This finding on the Court's part requires an explanation, since the Defendant did not actually participate in the physical abuse which brought about the death.

Dorothy McClellan is an extremely strong-willed and manipulative woman who was unquestionably the leader of the Stonegate group. She instituted therein a policy of child discipline which ultimately encouraged the acts which brought about Joey Green's death, and thus is just as surely responsible as if she had wielded the paddle herself. One only has to

realize that her teachings created an atmosphere in which each set of parents had their own monogrammed paddles, which were carried openly and used frequently. Indeed, through her leadership there evolved a system of child abuse which was mistakenly justified under the guise of religion.

Certainly the parents of the child who inflicted the physical abuse were at fault. Perhaps their punishment was not severe enough, but it was all that was allowable under the law; and, having observed and heard the testimony of Stuart and Leslie Green, the Court is sure in its own mind that they were the type personalities easily controlled by a strong leader, that they eagerly sought that leader's favor, and that they acted in fear of that leader and the social ostracism which they knew she could bring down upon them.

Additionally, the Court knows that nothing the law could do to them could equal that which they have done to themselves. They must live the rest of their lives, as they have lived the last two plus years, with the certain knowledge that they killed their own child whom they both loved very much.

The Court realizes that the Defendant has no prior criminal record. The Court realizes she enjoys the support of a segment of this community, including some community leaders. The Court realizes that a prison sentence will work a severe hardship on her family and loved ones, who did nothing to deserve same. However, the violent death of a twenty-three month old baby, under the circumstances of this case, deserves nothing less than a penitentiary sentence.

THEREFORE, it is the SENTENCE AND

JUDGMENT of this Court that the Defendant, Dorothy McClellan, for the offense of Conspiracy to Commit Unlawful Wounding, be sentenced to the penitentiary for not less than one nor more than five years. It is the further SENTENCE and JUDGMENT of this Court that for the offense of Involuntary Manslaughter, she be sentenced to the County Jail for twelve months, this sentence to run concurrent with the prior sentence. It further appearing to the Court that the Defendant is entitled to a stay of execution on serving this sentence until a reasonable time past the next term of the West Virginia Supreme Court of Appeals. Therefore, it is ORDERED that execution of sentence is stayed until May 14, 1985, and the Defendant is directed to report to the Jefferson County Jail at 9:00 a.m. on that date. The Defendant shall remain on bond until May 14.

The Defendant by counsel thereupon inquired of the Court why the Defendant's bond would be discontinued after May 14, 1985, regardless of whether the stay now in effect remains in effect until May 14, 1985. The Court informed counsel for the Defendant that he could address the issue that he was attempting to raise directly to the Court by correspondence and that he would then respond upon being able to understand more clearly the Defendant's position regarding whether an amendment to West Virginia Code §62-7-3 affects the Defendant's right to remain free on bond following the expiration of a stay.

The Clerk shall enter the foregoing as of the day and date first above written and shall transmit copies teste to all counsel of record.

/S/

The Defendant by counsel thereupon inquired of the Court why the Defendant's bond would be discontinued after May 14, 1985, regardless of whether the stay now in effect remains in effect until May 14, 1985. The Court informed counsel for the Defendant that he could address the issue that he was attempting to raise directly to the Court by correspondence and that he would then respond upon being able to understand more clearly the Defendant's position regarding whether an amendment to West Virginia Code §62-7-3 affects the Defendant's right to remain free on bond following the expiration of a stay.

The Clerk shall enter the foregoing as of the day and date first above written and shall transmit copies teste to all counsel of record.

/S/
JUDGE

PRESENTATION OF FEDERAL QUESTION

A. Fourteenth Amendment Due Process Claim

[Excerpt from trial transcript]

SECOND DAY
Thursday, November 8, 1984
9:01 o'clock a.m.

The trial was resumed pursuant to adjournment on yesterday, Wednesday, November 7, 1984, there being present the same parties as were heretofore noted, including the defendant and her counsel.

THE COURT: Okay, the following proceedings are taking place out of the presence of the jury, at the request of defense counsel that he be able to put certain matters on the record prior to commencement.

MR. ASKIN: If it please the Court, Your Honor, I would ask the Court at this time to either make a ruling or ask the State to proffer to the Court so that a ruling could be made as to the scope of the

period of time that the conspiracy counts of the indictment would cover. I believe we're at the time and stage where witnesses will be offering testimony about the behavior they observed, witnessed or were engaged in in the McClellan household. And we're still dealing with a time period that, according to the Bill of Particulars, extend [sic] back as far as 1974. And I would ask the Court at this time to again either ask the State to make a proffer, have an incamera [sic] hearing or make a definitive ruling so that we can have some idea of where we're going from the defense standpoint.

Secondly, if, in fact, I'm correct and the State intends to offer witnesses who were former residents in the household, we would ask that prior to each witness being called, if there is to be testimony beyond or prior to October 5, 1982, as involving

alleged acts, circumstances or events that don't directly pertain to Joseph Green, that there be an incamera [sic] hearing so that we would have an opportunity to make our objections on the record and not have to continue to do it in front of the jury. And the Court could perform the balancing function of determining prejudicial effect against probative value.

* * *

THE COURT: Okay. And as to the motion --I'll reserve to the defense counsel a standing objection to the evidence going back that far. I'm not going to have an incamera hearing before each witness, however.

MR. ASKIN: The only concern I have, Your Honor, is, as I mentioned to the Court yesterday, I have prepared for each witness a chronological summary of information that's been provided me by Mr. Hamstead

through transcripts of witnesses' testimony and statements wherein many, many alleged bad acts of Mrs. McClellan, that have nothing to do with Joseph Green directly, may be offered by these witnesses.

And what I'm concerned about again is that if Your Honor permits the State to offer all these into evidence under some theory that this is merely within the scope of the date they have chosen to say the conspiracy began, then Your Honor decides at a later date that any or all, selectively some, are not admissible, then we're dealing with prejudice to Mrs. McClellan that's almost undefined and, of course, the problem of whether he would have to grant a mistrial; and we've gone through all this.

The one (1) thing I think our Court's so protective of is the defendant's right to be free from merely shotgunning

defendants with all kinds of activity. And there are so many things for some of these witnesses, Your Honor, that just have nothing to do with Joseph Green, that I'm just respectfully submitting, Your Honor, to be given an opportunity before the witness testifies to explain to the Court what some of these witnesses are likely to say. And, hopefully, Your Honor can tell Mr. Hamstead that some of these things really have no relevance or bearing and are extremely prejudicial to this trial.

And I don't want to disrupt the proceedings, but I would like to have an opportunity before the witnesses testify so the Court knows what I'm talking about when I say, Judge, these are some of the things that may very well come out under this shotgun theory of the State's case, picking a date eight (8) years before the offense and saying it's all relevant. And it's

just not fair to Mrs. McClellan.

THE COURT: Okay. I understand your position, and I think your record is protected in that regard. As I indicated, its not my desire to come over here and get this case tried as quickly as possible and out of the way. On the other hand, its not my desire to come over here and have an incamera [sic] hearing before every witness. The record is adequately protected for the defendant since the Court is indicating at this point that I will grant to the defendant a standing objection to each of these witnesses and any testimony they may give of actions on the part of the defendant prior to 1982 and having nothing to do with Joey Green.

So I think the record is protected in that regard.

MR. ASKIN: I appreciate that. But the only other thing I would ask is that

even without an incamera [sic] hearing, the State be asked to make a proffer of any information that would be unrelated to Joseph Green that, for instance -- well, I won't go name by name, witness by witness-- but if the State intends to offer a witness to testify about matters, again, that are unrelated directly to Joseph Green, if Mr. Hamstead could proffer to the Court whether he intends to offer this witness for a particular testimony so that Your Honor may agree with me that it's totally unnecessary and prejudicial and still avoid the necessity of parading the witness in outside the presence of the jury, but a simple proffer as to what he offers the witness for.

THE COURT: No, I won't do that.

MR. ASKIN: Note our objection to that ruling, Your Honor.

[Transcript, pp. 245-249.]

* * *

A. No, not in my heart, because Jenny was the sweetest, kindest girl. And I saw more love in her than I ever saw coming from Dot. And I didn't understand why everybody was jumping on Jenny.

MR. ASKIN: Your Honor, I object. This is why I asked for -- I mean, this is not proper testimony, characterizing Jenny as sweeter than Dot, more love in Jenny than in Dot. Your Honor, that's improper. I'm going to ask again for a mistrial and that you instruct the jury to disregard. I mean, this is just not proper.

THE COURT: Okay. The objection is overruled. The defense will have a standing objection to this type of questioning.

[Transcript, p. 404.]

Supreme Court, U.S.
FILED
DEC 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-575

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DOROTHY McCLELLAN,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES G. BROWN
Attorney General

SILAS B. TAYLOR
Deputy Attorney General

MARY BETH KERSHNER
Assistant Attorney General

State Capitol, Room 26-E
Charleston, West Virginia 25305
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COUNSEL FOR RESPONDENT

85pp

QUESTION PRESENTED

1. Does the refusal of Dorothy McClellan's petition for appeal by the West Virginia Supreme Court of Appeals constitute a "final judgment or decree" as required by 28 U.S.C. § 1257?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED . .	1
STATEMENT OF THE CASE.	2
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE WRIT . . .	3
THE REFUSAL BY THE WEST VIRGINIA SUPREME COURT OF APPEALS TO ACCEPT DOROTHY McCLELLAN'S PETITION FOR APPEAL WAS NOT A FINAL JUDGMENT OR DECREE DUE TO THE SUBSEQUENT ACTIONS OF THAT COURT.	3
CONCLUSION	10
APPENDIX A	A-1

TABLE OF AUTHORITIES

	Page
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975)	6
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 89 L. Ed. 2d 2091, 65 S. Ct. 1475 (1945)	9

CONSTITUTIONS AND STATUTES

West Virginia Constitution Article VIII, Section 4	3
28 U.S.C. § 1257.	1,5,9
28 U.S.C. § 1257(3)	1

JURISDICTION

The State does not take issue with the assertions concerning jurisdiction made by the petitioner, except that, since the time the Petition for Writ of Certiorari was filed, petitioner received some relief on her Motion for New Trial from the West Virginia Supreme Court of Appeals. It is the State's position that said relief affects this Court's jurisdiction under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in

> question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The state is in substantial disagreement with the petitioner regarding the facts as proven at appellant's trial. However, for the purposes of this Brief in Opposition, it is the position of the state that the proceedings at petitioner's trial are irrelevant here.

SUMMARY OF ARGUMENT

(a) This Court may review on certiorari only "final judgments or decrees" of a state's highest court. Due to a remand to the Circuit Court of Jefferson County by the West Virginia

Supreme Court of Appeals of petitioner's Motion for New Trial, petitioner still has the opportunity to prevail in state court, regardless of the validity of earlier state court rulings on the federal issues raised in her petition. For this reason, this Court lacks jurisdiction over this matter.

REASONS FOR DENYING THE WRIT

THE REFUSAL BY THE WEST VIRGINIA SUPREME COURT OF APPEALS TO ACCEPT DOROTHY McCLELLAN'S PETITION FOR APPEAL WAS NOT A FINAL JUDGMENT OR DECREE DUE TO THE SUBSEQUENT ACTIONS OF THAT COURT.

On June 11, 1986, the West Virginia Supreme Court of Appeals refused to consider Dorothy McClellan's petition for appeal. The West Virginia Supreme Court of Appeals is granted the discretion to accept or deny all appeals by the state constitution. Article VIII,

Section 4, of the West Virginia Constitution.

Following this denial, and the denial of a subsequent Motion for Reconsideration, petitioner filed a Motion for New Trial with the trial court on or about July 16, 1986. (A. 1-3) The grounds asserted were that petitioner had uncovered new evidence that Stuart and Leslie Green, the parents of the victim, had testified against her because of an arrangement between the Greens and the West Virginia Department of Human Services. This alleged arrangement required the Greens to testify against petitioner in exchange for the return of custody of their daughter Julie by the West Virginia Department of Human Services. (A. 4-7)

On October 20, 1986, the Honorable Fred Fox, Circuit Judge, ruled that he had found no evidence of such an arrangement based upon his review of the relevant records of the West Virginia Department of Human Services, and that the motion was therefore denied. (A. 8-17) Petitioner appealed this ruling to the West Virginia Supreme Court of Appeals on October 21, 1986 (following the filing of the Petition for Writ of Certiorari in this Court). (A. 18-68) The Supreme Court of Appeals treated the matter as a writ of habeas corpus, and returned it to the circuit court "for the purposes of permitting counsel to examine the Department of Human Services records." (A. 69-70)

It is apparent that petitioner has not yet received a "final judgment or decree" as required by 28 U.S.C. § 1257,

and that therefore this Court lacks jurisdiction to hear this matter. Should petitioner uncover evidence requiring a new trial, there would be no need at this point for review of the federal constitutional issues raised in her petition. Should her Motion for New Trial ultimately be denied, she would have the opportunity to raise the federal issues at that time. Either way, the acceptance of certiorari at this time is not appropriate.

There are, of course, a few limited exceptions to the "final judgment" requirement. These exceptions, as outlined in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975), fall into four (4) categories: (1) "where * * * the federal issue is conclusive or the outcome of further proceedings

preordained," 420 U.S. 479, 43 L. Ed. 340; (2) where "the federal issue * * * will survive and require decision regardless of the outcome of further state court proceedings," 420 U.S. 480, 43 L. Ed. 2d 340; (3) "where the federal claim has been finally decided, with further proceedings on the merits in state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," 420 U.S. 481, 43 L. Ed. 2d 341; and (4) "where the federal issues has been finally decided * * * with further proceedings pending * * * and where reversal of the state court on the federal issue would be preclusive of any further ligitation," 420 U.S. 482-483, 43 L. Ed. 2d 342. None of these exceptions apply to this case.

The decisions by the state courts here on the federal issues are not "conclusive" nor is the outcome of petitioner's motion for new trial "preordained." She may prevail on non-federal grounds in state court on her Motion for New Trial, should she be able to in fact produce evidence which was unknown to her at the time of her trial. Should she be granted a new trial, the federal issues would not survive "regardless of the outcome of further state proceedings," as a new trial could result in an acquittal. If petitioner does not receive a new trial, or if she is convicted after a new trial, she will then still be able to raise the federal issues presented in her Petition for Writ of Certiorari, so this is not a case "in which later

review of the federal issues cannot be had."

Finally, a reversal of the state courts on the federal issues would not preclude the state from retrying petitioner, as such a reversal would only place some limitations upon the evidence presented by the state at such a trial.

A judgment is not reviewable by certiorari "where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124, 89 L. Ed. 2d 2092, 65 S. Ct. 1475 (1945).

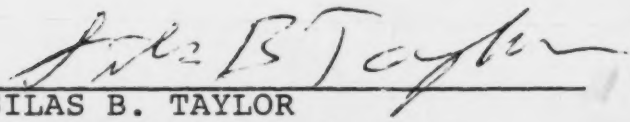
CONCLUSION

Because the proceedings currently pending in state court may render the federal issues moot, and because this

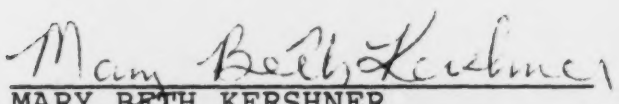
case does not fall within any of the limited exceptions to the finality rule of 28 U.S.C. § 1257 recognized by this Court, there is no jurisdiction for the review of the federal issues on certiorari by this Court.

Respectfully submitted,

CHARLES G. BROWN
Attorney General



SILAS B. TAYLOR
Deputy Attorney General
and Counsel of Record



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APPENDIX

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF

VS. CRIMINAL NOS. 84-F-58 & 84-M-3

DOROTHY McCLELLAN,

DEFENDANT

MOTION FOR NEW TRIAL

NOW COMES THE DEFENDANT, pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure, and moves the Court to award her a new trial on the ground of newly discovered evidence. Said newly discovered evidence is as follows:

On the ____ day of February, 1986, this Court Ordered, without objection by the State, that the custody and control of Julie Green, infant, be returned to her natural parents, Stuart and Leslie Green. At the trial in this matter

before the jury on November 7, 1984, through November 9, 1984, witnesses, Leslie Green, Stuart Green, and Jan Adams, testified that there was no arrangement concerning the return of Julie Green to the custody of Stuart and Leslie Green. (Tr. pp. 505-506, 517, 568-569, 604.)

Defendant moves the Court for an evidentiary hearing concerning the circumstances of the State of West Virginia agreeing to return Julie Green to the custody of Stuart and Leslie Green. Defendant further moves the Court for a written transcript of all proceedings regarding the return of Julie Green to the custody of Stuart and Leslie Green.

The Defendant says that information regarding the arrangement for the return of Julie Green to the custody of Stuart

and Leslie Green was discovered by her since the trial; that the evidence is material; that the evidence is such as ought to produce an opposite result at a second trial on the merits.

DOROTHY McCLELLAN
BY COUNSEL

/s/ Steven M. Askin
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September 10, 1986

The Honorable Fred Fox, II
Judge - 16th Judicial Circuit
P. O. Box 629
Fairmont, WV 26554

RE: State vs. Dorothy McClellan

Dear Judge Fox:

I received the transcript of the entire trial on Friday, the 5th day of September, 1986.

I think it is important when you consider the testimony of the witnesses that you do so in light of the Motion for Discovery and the response thereto that was filed and argued in the case pre-trial. I would submit the case file will reflect a Motion for Discovery

asking for that very type of impeachment evidence that I submit existed. It is in light of the discovery that we did receive, as well as what we didn't receive that the testimony of the witnesses should be considered. I would submit that if a hearing is held, the evidence will demonstrate that when the Greens changed attorneys, conversations began between their new attorney, the prosecutor, and the Department of Human Services pertaining to how the Department of Human Services would proceed against the Greens and their daughter, Julia. In that the State not only denied this pre-trial during the trial, the jury was mis-led by that testimony of Jan Adams and my cross-examination was adversely affected. The cross-examination of Jenny Slosher at page

328, Stewart Green beginning at page 510, and Leslie Green beginning at page 596 would have been materially different had I been given discovery material as to conversations, discussions, or understandings that were on-going and had been reached before the trial or while the trial was in progress. When Jan Adams testified as she did beginning at page 567, it would have been a futile waste of my time to attempt to call her a liar without the discovery material.

Therefore, I think the Court needs to consider whether the State withheld discovery that was specifically requested long before the trial commenced that would have materially affected how I would have developed my cross-examination, as well as calling witnesses such as Dennie Pentony and/or

Mr. Woods and would have led to a probing, in-depth cross-examination of Jan Adams to demonstrate that she was not full, complete, and accurate in her testimony.

I hope that your examination of these witnesses' testimony in this light will convince you that Mrs. McClellan is entitled to a new trial.

Sincerely,

/s/ Steven Askin

Steven M. Askin
Attorney-at-Law

SMA:pjb

cc: Michael Thompson, Prosecuting Attorney for Jefferson County
Dorothy McClellan

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF,

VS. CASE NO. 84-F-58 & 84-M-3

DOROTHY MCCLELLAN,

DEFENDANT

O R D E R

This 1st day of August, 1986, came the State of West Virginia by Jefferson County Prosecuting Attorney, Michael Thompson, and came the defendant in person and by counsel, Steven M. Askin, all appearing this day before the Honorable Fed Fox, Special Judge selected by the Supreme Court of Appeals to preside in this matter.

Thereupon, the Court proceeded to consider Defendant's motion to set aside the verdict of the jury on the grounds of newly discovered evidence and upon

counsel for Defendant explaining to the Court the necessity for review by either counsel for the Defendant and/or the Court of the records of the West Virginia Department of Human Services regarding whether or not there were on-going negotiations regarding whether the infant, Julia Green, should be returned to her natural parents or the parents of Stewart and/or Leslie Green as reflected by written documents contained in the Department of Human Services file and due to the voluminous records that were brought this day to Court by a representative of the Department of Human Services pursuant to a subpoena duces tecum issued from the Office of the Clerk of this Court, it is the opinion of the Court to continue all matters regarding the motion to set aside the verdict on the grounds of

newly discovered evidence to permit the Court to receive copies of all Welfare Department records involving the dependent and neglect proceeding of Stewart and Leslie Green and the infant child, Julia Green, and that copies of the records be provided to the Court in Fairmont, West Virginia, following which the Court will examine same to determine whether or not there are any letters, correspondence, written records, or other documents or memorandum reflecting discussions about and/or understandings reached about the transfer of custody of the infant child, Julia Green, to her parents prior to the trial of the Defendant, which occurred on the 7th day of November, 1984, to which action of the Court the State objected and excepted.

Thereupon, counsel for Defendant moved the Court to continue Defendant's bail until the issue of whether a new trial should be awarded to the Defendant on newly discovered evidence, which motion for continued bail was objected to by the State and it is the opinion of the Court to grant said motion to continue bail for a period of forty-five (45) days from this date to permit the Court to review the records and documents of the Department of Human Services and thereafter notify counsel for the Defendant and counsel for the State whether an evidentiary hearing will be necessary on the issues raised by said motion.

Thereupon, the Court proceeded to consider the motion to reduce sentence pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure and

received into evidence letters written by the Defendant's children and upon receiving argument by counsel for the Defendant and counsel for the State, and upon the Defendant exercising her rights to allocution, the Court will reserve ruling on the motion to reduce sentence pending an opportunity to review the letters of the Defendant's children offered and accepted into evidence this day and it is the opinion of the Court to enter an Order regarding whether a new trial should be awarded and/or further hearings be held upon said motion for new trial and whether the Defendant's motion to reduce sentence should be granted and that a copy of said order will be provided to counsel for the Defendant and counsel for the State, notifying the Defendant of the Court's ruling.

The Clerk shall enter the foregoing as of the day and date first above written.

/s/ Fred Fox, II
THE HONORABLE FRED FOX, JUDGE

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS. CRIMINAL ACTION NO. 84-F-58
83-M-5

DOROTHY McCLELLAN,
Defendant.

ORDER

THIS MATTER came on to be heard the ___ day of _____, 1986, upon the papers and proceedings formerly read and had herein; upon the Defendant's Motion For A New Trial (on the ground of newly discovered evidence); upon the Defendant's Motion To Reduce Sentence; upon the hearing of said motions on August 1, 1986, upon the proffered documents; upon the arguments of counsel; upon the production of a large file by the Department of Human Services of numerous documents concerning "Stonegate" abuse and neglect matters; upon the Court

reviewing copies of all of the documents contained in said file for any indication that there was an 'arrangement' concerning the return of Julie Green to the custody of her parents in return for the parents' testimony for the State.

In consideration of all of which the Court did find no evidence that the Department of Human Services had ever discussed with Stuart Green or Leslie Green their testimony against the Defendant Dorothy McClellan or any arrangement, promise or commitment concerning the same; and the Court did find no basis to believe that the denials by Stuart Green and Leslie Green of any arrangement were anything less than truthful; and that the Court did find no newly discovered evidence which would warrant granting of a new trial.

Accordingly the Defendant Dorothy McClellan's Motion For A New Trial is ORDERED denied and the Defendant's objection and exception noted.

In consideration of the Defendant Dorothy McClellan's Motion To Reduce Sentence upon the statements of the Defendant's children submitted in support of said motion and the statement made by the Defendant Dorothy McClellan in open court in support thereof and the arguments of counsel, the Court did find no reasons to change the sentence as previously imposed.

Accordingly the Defendant Dorothy McClellan's Motion To Reduce Sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure is hereby ORDERED denied to which denial the Defendant's objection and exception is noted.

In consideration of all of which it is by the Court ORDERED that the Defendant Dorothy McClellan shall surrender herself to the Sheriff of Jefferson County, West Virginia on October 15, 1986 at 9:00 A.M. for incarceration and subsequent transfer to the State Penitentiary For Women at Alderson, West Virginia.

The Clerk will enter the foregoing as of the day and date first above written and shall transmit attested copies to all counsel of record.

/s/ Fred Fox, II
JUDGE

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA AT CHARLESTON

STATE OF WEST VIRGINIA,

VS.

DOROTHY McCLELLAN,

PETITIONER

NOTICE OF FILING PETITION FOR APPEAL
AND MEMORANDUM OF ARGUMENT AND
TRANSMISSION OF RECORD TO THE
SUPREME COURT OF APPEALS OF
WEST VIRGINIA

TO: The Honorable Doris Whiting
Clerk of the Circuit Court
of Jefferson County, West Virginia

and

Michael Thompson, Prosecuting
Attorney for Jefferson County,
West Virginia
County Building
Charles Town, WV 25414

You are hereby respectfully notified that the Petition for Appeal and Memorandum of Argument has been filed with the Clerk of the Circuit Court of Jefferson County, West Virginia, and the Clerk is requested to

forward the Petition, Memorandum of Argument, and Petition for Bond to the Supreme Court of Appeals of West Virginia, pursuant to law.

/s/ Steven M. Askin/pjb
Steven M. Askin

/s/ David P. Greenberg
David P. Greenberg

IN THE SUPREME COURT
OF
APPEALS OF WEST VIRGINIA
CHARLESTON

STATE OF WEST VIRGINIA,

PLAINTIFF/RESPONDENT

VS.

DOROTHY McCLELLAN,

DEFENDANT/PETITIONER

PETITION FOR APPEAL

Your Petitioner, Dorothy McClellan, respectfully represents and says unto Your Honors that she is prejudiced and aggrieved by the judgment of the Circuit Court of Jefferson County, West Virginia, rendered in the above-entitled case on the 24th day of September, 1986, denying her motion for new trial based on newly discovered evidence. The rulings and decisions of the Circuit Court and the exceptions taken by Petitioner and her counsel upon which

your Petitioner relies for the reversal of the judgment claimed of herein are herewith filed and asked to be taken as part of this Petition. If this Honorable Court grants this Petition for Appeal, it is respectfully prayed for a stay and bail to be awarded to your Petitioner pending the outcome of the appeal.

The Petition for Appeal is being filed pursuant to Rule 4(a) of the West Virginia Rules of Appellate Procedure.

IN THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA
CHARLESTON

STATE OF WEST VIRGINIA,

PLAINTIFF/RESPONDENT

VS. CASE NO.

DOROTHY McCLELLAN,

DEFENDANT/PETITIONER

STATEMENT OF THE CASE

On October 5, 1982, Joseph Green, a two year old boy, died as a result of his father, Stewart Green, spanking him for approximately two hours with a wooden paddle. Immediately after Joseph Green's death, the West Virginia Department of Human Services (hereafter referred to as "DHS") began a child abuse/neglect investigation involving all "Stonegate" parents and their respective minor children, including Stewart and Leslie Green's minor children, Tiffany Green and Julie Green.

(State of West Virginia vs. Jacob Fansler, Infant, et al, Child Abuse/ Neglect Petition No. 83-J-24)

Thereafter, a Jefferson County Grand Jury indicted Petitioner for the charge of conspiracy to commit unlawful wounding, conspiracy to commit involuntary manslaughter, and involuntary manslaughter.

On November 7, 1984, through November 10, 1984, Petitioner was tried before the Honorable Fred L. Fox, II, Judge, and a petit jury. The jury returned a verdict against your Petitioner of guilty to involuntary manslaughter and guilty of conspiracy to commit unlawful wounding.

On March 1, 1985, Petitioner was sentenced to not less than one nor more than five years upon her conviction for the offense of conspiracy to commit

unlawful wounding and sentenced to be confined to the Jefferson County Jail for twelve months upon her conviction for the offense of involuntary manslaughter. Both sentences are to run concurrently.

On June 11, 1986, this Honorable Court denied Petitioner's Petition for Appeal. On July 15, 1986, this Honorable Court denied Petitioner's Motion to Reconsider her Petition for Appeal.

On July 16, 1986, Petitioner filed a motion for new trial based on newly discovered evidence. (attached hereto as exhibit A.) The motion for new trial concerned "DHS" documents proving that [State] witnesses Stewart Green, Leslie Green, and "DHS" social worker, one, Jan Adams each testified falsely when cross

examined regarding whether any arrangement existed between the Green's counsel and the "DHS" concerning the Greens gaining custody of Julia. Leslie Green, Stewart Green, and Jan Adams each testified at trial that there was no such arrangement. (Tr. pp. 505-507, 517, 568-569)

Before trial, Petitioner filed a discovery motion requesting, inter alia, any conversations, discussions, promises, inducements, or understandings that were on-going that had taken place before trial or while the trial was in progress. After the trial, Petitioner received information that "DHS" documents styled memorandum dated November 9, 1984, recording log dated October 15, 1984, recording log dated November 30, 1984, support her accusation that prior

to trial there existed on-going negotiations between the Green's attorney, the prosecutor, and the "DHS" concerning returning Julie Green to her parents custody.

On August 1, 1986, the trial court agreed to review the "DHS" records to determine whether there existed on-going negotiations at the time of the trial between the State and the Green's concerning returning Julie Green to her parents custody. Further, if such negotiations existed whether that supports awarding Petitioner a new trial. (August 1, 1986, Order attached hereto as exhibit B) Over Petitioner's objection, the trial court refused to allow Petitioner's counsel access to the records, therefore Petitioner's counsel was unable to argue why the records support the motion for new trial.

On September 24, 1986, the trial court held that a review of the "DHS" records revealed no evidence that the "DHS" had ever discussed with Stewart or Leslie Green their testimony as to Petitioner, much less any arrangement, promise, or commitment concerning same. The trial court found no newly discovered evidence that would warrant the granting of a new trial. (September 24, 1986, Order attached hereto as exhibit C)

On October 6, 1986, the trial court granted a stay of execution of sentence until February 13, 1987, however Ordered that the Defendant report to the Sheriff of Jefferson County on October 15, 1986, to be held in the Jefferson County Jail pending her Petition for Appeal.

Wherefore, your Petitioner prays for this Honorable Court to reverse the

trial court's Order of September 24, 1986, denying her motion for new trial based on newly discovered evidence.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO AWARD A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

Immediately after the October 5, 1982, tragic death of Joseph Green, the "DHS" began a Child Abuse/Neglect investigation involving all Stonegate parents and their respective minor children, including Stewart Green and Leslie Green's minor children, Tiffany Green and Julia Green. (State of West Virginia vs. Jacob Fansler, Infant et al., Child Abuse/Neglect Petitioner 83-J-24) At the time of Petitioner's trial the "DHS' maintained legal custody of Julie Green.

Before trial, Petitioner filed a discovery motion requesting, inter alia, any conversations, discussion, promises, inducements, or understandings made to [government] witnesses in exchange for their testimony. The State denied any such information existed.

On July 16, 1986, Petitioner filed a motion for new trial alleging certain "DHS" documents exist that prove [government] witnesses Stewart Green, Leslie Green, and "DHS" social worker, one, Jan Adams each testified falsely during cross examination by denying negotiations existed between the Green's attorney and the "DHS" concerning returning Julia Green to her parents custody. (Tr. pp. 5050-507, 517, 568-569) "DHS" documents prove Petitioner's accusation: memorandum dated November 9, 1984; recording log dated

October 15, 1984; and recording log dated November 30, 1984.

Petitioner's motion for new trial based on newly discovered evidence should also encompass what Petitioner calls the "new story" told to Petitioner's counsel for the first time on the first day of trial. At that time Petitioner's counsel was informed by the State that Stewart Green and Leslie Green had just revealed new evidence. (Tr. pp. 142-143) The evidence was that approximately one week before the death of Joseph Green, your Petitioner's son had beaten his son in a like or similar manner, and that following the beating the other individuals who lived at "Stonegate" discussed the beating and agreed to cover up the incident. Your Petitioner was also supposed to have made a statement to Leslie Green that

one day she would have to go through something like this with her son Joseph, the deceased.

Over Petitioner's objection, Stewart Green testified that Petitioner's son had beaten his son and that everyone in the Stonegate residence agreed that it was good that the infant child had been struck. (Tr. pp. 492-493, 509) Leslie Green on direct examination also offered testimony about this incident. (Tr. pp. 585-588)

The State by failing to disclose that negotiations had begun simultaneous with the disclosure of the "new story" between the Green's new counsel and the State of West Virginia deprived Petitioner's counsel of a significant area of cross examination and denied the jury the right to weigh the credibility of the "new story" against what your

Petitioner says was the Green's real inducement to make up such testimony.

In asking this Court to decide whether the trial court erred in failing to award a new trial on the ground of newly discovered evidence, Petitioner requests the Court to review the general rule in West Virginia regarding newly discovered evidence and the recent United States Supreme Court decision of United States vs. Bagley, ___ U.S. ___, 105 S.Ct. 3375 (1985).

In West Virginia the general rule regarding newly discovered evidence is set out in the lone syllabus point in State vs. Farley, 143 W. Va. 445, 104 S.E.2d 265 (1958), syllabus point ten of State vs. Hamrick, 151 W. Va. 1, 151 S.E.2d 252 (1966), syllabus point two of State vs. Wolfe, 277 S.E.2d 640 (W.Va., 1981), syllabus point two of State vs.

Stewart, 161 W.Va. 127, 239 S.E.2d 777 (1977), and syllabus point one of State vs. King, 313 S.E.2d 440 (W.Va., 1984):

> "A new trial will nct be granted on the ground of newly discovered evidence unless the case comes within the following rules: (1) the evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be or its absence satisfactorily explained. (2) It must appear from the facts stated in his affidavit that Plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side."

In the case at bar the newly discovered evidence falls within the rules listed above to support Petitioner being awarded a new trial:

(1) After Petitioner's trial, she received the information that "DHS" documents indicate that prior to trial the Green's attorney and the "DHS" were negotiating the return of Julia Green to her parents custody. Both prior to trial and during trial the State denied any such negotiations existed.

(2) Petitioner could not have ascertained prior to trial that State witnesses testified falsely by denying negotiations existed concerning returning Julie Green to her parents custody. Therefore, Petitioner used due diligence in securing the new evidence.

(3) The new evidence concerning the on-going negotiations regarding the

return of Julia Green to her parent's custody is new and material evidence; that for the reasons set forth in number four is sufficient evidence to award Petitioner a new trial.

(4)&(5) Petitioner shall address rules four and five together. The newly discovered evidence ought to produce an opposite result at a second trial on the merits. Petitioner's counsel's cross examination of Stewart Green, Leslie Green, and Jan Adams was adversely affected in a material way by the State's failure to disclose that Stewart Green and Leslie Green through their new counsel had entered negotiations with the State to reclaim custody of Julia Green. By not disclosing the on-going negotiations, Petitioner was prevented from arguing to the jury that the Greens inducement to regain custody of their

infant child was the reason why on the first day of trial they told the "new story".

Petitioner also submits that the State's failure to disclose on-going negotiations between the Greens and the State deprived Petitioner of the following relevant and material evidence: First, that Leslie Green and Stewart Green were influenced and induced by the State as to their overall testimony by the realistic hope and expectation that these negotiations would help them regain custody of their child; Second, the on-going negotiations may have induced Leslie Green and Stewart Green to invent the "new story" that was first told simultaneously with the commencement of the negotiations; Third, Petitioner's counsel's ability to effectively cross examine Leslie Green,

Stewart Green, and Jan Adams regarding their denial of on-going negotiations as well as Petitioner being in a position to call witnesses such as Dennis Pentney, supervisor of the "DHS" investigation, and/or Mr. Richard Woods, the Green's new attorney, to impeach the testimony of Leslie Green, Stewart Green, and Jan Adams denying on-going negotiations existed. Fourth, Petitioner's counsel's ability to more fully cross examine Leslie Green's sister and State witness, Jenny Slosher. Petitioner says that if she was aware of the on-going negotiations, her counsel would have engaged in probing, in-depth cross examination of Stewart Green, Leslie Green, and Jan Adams to demonstrate that they were not full, complete and accurate in their testimony.

Your Petitioner says the issue in State vs. Stewart, 239 S.E.2d 777 (W.Va., 1977) is similar to the issue in the case at bar. In State vs. Stewart, supra, this Court reversed the defendant's conviction for delivery of a controlled substance. Four months after the conviction new evidence was discovered that the principal witness for the State, a West Virginia state trooper, derived his testimony from reports that he routinely altered and falsified. The Stewart Court held:

> "We feel that if the first four rules are satisfied in cases involving after-discovered impeachment evidence, where the impeachment goes to the key prosecution witness, then a new trial should be granted. The 'fifth rule' merely says that new and material impeachment evidence, discovered after trial, and not such that would have been secured before trial by due diligence, ordinarily is not the kind of evidence that

> satisfied the 'fourth rule' (i.e. it is not the kind of evidence 'that ought to produce an opposite result at a second trial on the merits.')"

In the case at bar, as in Stewart, supra, the newly discovered evidence impeached key prosecution witnesses. Petitioner submits she was denied a fair trial because the jury was deprived of considering whether the on-going negotiations between the "DHS" and the Green's counsel regarding the Greens regaining custody of Julia was in any way an inducement for the Green's to falsify their testimony against Petitioner.

In State vs. Wolfe, 277 S.E.2d 640 (W.Va., 1981) this Court reversed the defendant's conviction of grand larceny on the basis that the defendant was entitled to a new trial because of newly

discovered impeachment evidence. The State's key witness gave testimony at a subsequent trial which was materially different from testimony that he gave against the defendant. The subsequent testimony of the key witness related to a critical fact going to the issue of intent on the part of the defendant. The Wolfe Court held it was reasonable to conclude that the jury might have reached a different conclusion as to the guilt or innocence of the defendant had they had the facts which the key witness testified to in another trial.

Another case similar to the case at bar is the United States Supreme Court case of Giglio vs. United States, 405 U.S. 150 (1972) discussed by this Court in State vs. Stewart, supra. In Giglio, supra, defense counsel discovered after trial that a United States attorney

promised the government's key witness that he would not be prosecuted if he testified against the defendant before a grand jury. At trial, the key witness specifically said that nobody told him that he would not be prosecuted. The government's trial attorney told the jury that the key witness received no promises that he would not be indicted. The United Supreme Court reversed Giglio's conviction because the key witness's credibility was an important issue in the case:

> "Any evidence of any understanding or agreement as to future prosecution would be relevant to his credibility and the jury was entitled to know of it."

Clearly, in the case at bar as in Giglio, supra, the jury was entitled to know whether the State had an understanding or agreement with a witness or

a witness's attorney specifically, Stewart and Leslie Green as to regaining custody of their child.

The recent United States Supreme Court of United States vs. Bagley, supra, supports Petitioner being awarded a new trial. In Bagley, supra, the defendant Bagley was indicted on charges of violating federal narcotics and firearms statutes. Before trial he filed discovery motions requesting information on any deals made to government witnesses in exchange for their testimony. The government denied any such deals had been made to its witnesses. After trial, Bagley learned that prior to trial two principle government witnesses had signed contracts with the government to receive money if they provided information to the satisfaction of the government.

Following the trial the government paid Three Hundred Dollars ($300.00) to each of the two principle government witnesses. The Bagley Court held that the suppression of impeachment or other exculpatory evidence amounts to constitutional error requiring reversal "if such evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."

Petitioner submits that in applying the Bagley rule to the facts of her case, it is clear that the evidence suppressed would undermine confidence of the outcome of the trial. Petitioner submits that if the jury was aware that simultaneous with the Green's revelation of the "new story" there were these on-going negotiations surely such information would have undermined confidence in the Green's credibility.

Your Petitioner submits that the last minute disclosure and testimony about your Petitioner's son abusing his child and the conspiratorial coverup was devastating to her case. The believability of this evidence would have been affected by the disclosure that simultaneous with the Greens first mentioning these facts negotiations had just begun about returning to them custody. See also Hoover vs. State, 714 F.2d 301 (4th Cir., 1983), Chavis vs. North Carolina, 637 F.2d 213 (4th Cir., 1980), U.S. vs. Sutton, 542 F.2d 1239 (4th Cir., 1976), and Boone vs. Paderick, 514 F.2d 414 (4th Cir. 1976).

Petitioner also says that Judge Fox implied a too narrow test in deciding that the record did not demonstrate that newly discovered evidence existed. According to his letter of September 24,

1986, he concluded that there was no evidence that the Greens had ever spoken to "DHS" or the prosecutor. Petitioner acknowledges this fact, but submits that Judge Fox appears to be overlooking the fact that their counsel was involved in these negotiations and what is attributed to counsel should be attributed to the Greens. See: Boone vs. Paderick, supra. Petitioner submits that if the trial court or the State is of the opinion that what was being discussed between the Green's counsel and the State is not attributable to the Greens, then Judge Fox's original Order of August 1, 1986, should be followed, wherein he directed that an evidentiary hearing be held.

Clearly, at a minimum the record should be developed as to whether or not the on-going discussions and

negotiations that proceeded your Petitioner's trial were communicated to the Greens to determine if their state of mind was affected in any way by these negotiations, and/or was the development of the long suppressed story about your Petitioner's son's abuse reality or the produce of the negotiations. See also: State v. Jones, 161 W.Va. 55, 239 S.E.2d 763 (1977)

Petitioner would point out to the Court that following a remand from the United States Supreme Court to the Ninth Circuit, the Court in Bagley vs. Lumpkin, (9th Cir. 82-3033) decided September 2, 1986, 30 Cr. L. 2472, again held that the government's failure to disclose material impeachment evidence "undermined confidence in the outcome of the trial" and again reversed the conviction.

II. THE TRIAL COURT ERRED BY REFUSING TO ALLOW PETITIONER'S COUNSEL TO EXAMINE THE "DHS" RECORDS TO ARGUE WHY THE RECORDS SUPPORT PETITIONER BEING AWARDED A NEW TRIAL IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW PURSUANT TO ARTICLE 3, §10 OF THE WEST VIRGINIA CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The tiral court refused to allow Petitioner's counsel to review the "DHS" records. The trial court examined the records to determine whether there exists evidence to support awarding Petitioner a new trial.

In State ex rel Preissler vs. Dougherty, 273 S.E.2d 574 (W.Va., 1980) the defendant sought to prohibit his trial on a misdemeanor charge unless certain subpoenaed documents in

possession of the West Virginia Judicial Inquiry Commission be made available to him. The Judicial Inquiry Commission claimed the documents were confidential. The Preissler Court held:

> "We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality [as contrasted to questions of national security], it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated specific need for evidence in a pending criminal trial."

Recently, the issue herein was considered by the Pennsylvania Supreme Court in Commonwealth vs. Ritchie, 502 A.2d 148 (Pa., 1985) cert. granted, ___ U.S. ___, ___ S.Ct. ___, 39 Cr.L. 4059. In Ritchie, supra, the defendant was charged with sexually molesting his

minor daughter over a period of years. In the course of preparing for trial, the defendant's attorney subpoenaed Child Welfare Services (CWS) for records pertaining to the girl. The CWS claimed the records were confidential and refused to produce them. The trial court after an in-camera inspection of the records, made available to the defendant only those parts of the file which it determined to constitute verbatum statements (or the equivalent) by the girl regarding abuse. Defense counsel was permitted access to the entire record reviewed in-camera by the trial court, in order to argue relevance. The Pennsylvania Supreme Court held:

> "..., we must conclude that the trial court erred in refusing defendant access to the CWS files. We find that the Commonwealth's interest in

> maintaining the confidentiality of these records may not override a defendant's right to effectively confront and cross examine the witnesses against him. We agree with defendant that it would be absurd to read the statute as providing that the records be made available to a court of competent jurisdiction, while denying any use of them to the litigants in a criminal case before such courts."

Clearly, under the analysis set forth in Preissler, supra, and Ritchie, supra, the trial court in the case at bar committed reversible error by refusing to allow Petitioner's counsel access to the "DHS" records to show why the records support Petitioner being awarded a new trial. Petitioner submits her counsel, as an advocate, may view the "DHS" records in a different perspective than the trial court, and be in a position to explain to the Court when reviewing same how the documents would

be relevant and material. Petitioner therefore says she was denied her fundamental constitutional right to present evidence in support of her motion for new trial based on newly discovered evidence.

Wherefore, Petitioner moves that the matter be remanded to the trial court to allow Petitioner's counsel to review in its entirety the "DHS" records and directing the trial court to conduct an evidentiary hearing to determine the degree and extent of on-going negotiations between the State of West Virginia and the Green's counsel both preceding and during the trial of Petitioner's case, and whether same was communicated to them.

DOROTHY McCLELLAN
BY COUNSEL

/s/ Steven M. Askin/pjb

Steven M. Askin
Attorney for Petitioner
Askin, Pill, Scales & Burke, L.C.
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(304) 26-0909

/s/ David P. Greenberg
David P. Greenberg
Attorney for Petitioner
Askin, Pill, Scales & Burke, L.C.
P. O. Box 1938
Martinsburg, WV 25401
(304) 263-0909

CERTIFICATE OF COUNSEL

We, Steven M. Askin and David P. Greenberg, as attorneys for the Petitioner, says that the facts alleged in the Petition for Appeal are faithfully represented and that they are adequately presented to the best of our ability.

Steven M. Askin

/s/ David Greenberg
David P. Greenberg

Taken, subscribed, and sworn to before me this 10th day of October, 1986.

/s/ Lori A. Sine
Notary Public

My Commission expires: April 9, 1996 .

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF,

VS. CRIMINAL NOS. 84-F-58 &
84-M-3

DOROTHY McCLELLAN,

DEFENDANT

MOTION FOR NEW TRIAL

NOW COMES THE DEFENDANT, pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure, and moves the Court to award her a new trial on the ground of newly discovered evidence. Said newly discovered evidence is as follows:

On the ___ day of February, 1986, this Court Ordered, without objection by the State, that the custody and control of Julie Green, infant, be returned to her natural parents, Stuart and Leslie Green. At the trial in this matter before the jury on November 7, 1984,

through November 9, 1984, witnesses, Leslie Green, Stuart Green, and Jan Adams, testified that there was no arrangement concerning the return of Julie Green to the custody of Stuart and Leslie Green. (Tr. pp. 505-506, 517, 568-569, 596, 604.)

Defendant moves the Court for an evidentiary hearing concerning the circumstances of the State of West Virginia agreeing to return Julie Green to the custody of Stuart and Leslie Green. Defendant further moves the Court for a written transcript of all proceedings regarding the return of Julie Green to the custody of Stuart and Leslie Green.

The Defendant says that information regarding the arrangement for the return of Julie Green to the custody of Stuart and Leslie Green was discovered by her

since the trial; that the evidence is material; that the evidence is such as ought to produce an opposite result at a second trial on the merits.

DOROTHY McCLELLAN
BY COUNSEL

/s/ Steven M. Askin
Steven M. Askin
Attorney for Defendant
ASKIN, PILL, SCALES & BURKE, L.C.
P. O. Box 1938
Martinsburg, WV 25401
(304) 263-0909

CERTIFICATE OF SERVICE

I, Steven M. Askin, attorney for the Defendant in the foregoing action, hereby certify that I have served a true copy of the foregoing MOTION upon the Plaintiff by mailing same to Michael Thompson, Prosecuting Attorney for Jefferson County, at his address of County Building, Charles Town, West Virginia, 25414, by United States first class mail, postage prepaid this ____ day of July, 1986.

/s/ Steven M. Askin
Steven M. Askin

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF

V. CASE NO. 84-F-58 & 84-M-3

DOROTHY MCCLELLAN,

DEFENDANT

O R D E R

This 1st day of August, 1986, came the State of West Virginia by Jefferson County Prosecuting Attorney, Michael Thompson, and came the Defendant in person and by counsel, Steven M. Askin, all appearing this day before the Honorable Fred Fox, Special Judge selected by the Supreme Court of Appeals to preside in this matter.

Thereupon, the Court proceeded to consider Defendant's motion to set aside the verdict of the jury on the grounds of newly discovered evidence and upon

counsel for Defendant explaining to the Court the necessity for review by either counsel for the Defendant and/or the Court of the records of the West Virginia Department of Human Services regarding whether or not there were on-going negotiations regarding whether the infant, Julia Green, should be returned to her natural parents or the parents of Stewart and/or Leslie Green as reflected by written documents contained in the Department of Human Services file and due to the voluminous records that were brought this day to Court by a representative of the Department of Human Services pursuant to a subpoena duces tecum issued from the Office of the Clerk of this Court, it is the opinion of the Court to continue all matters regarding the motion to set aside the verdict on the grounds of

newly discovered evidence to permit the Court to receive copies of all Welfare Department records involving the dependent and neglect proceeding of Stewart and Leslie Green and the infant child, Julia Green, and that copies of the records be provided to the Court in Fairmont, West Virginia, following which the Court will examine same to determine whether or not there are any letters, correspondence, written records, or other documents or memorandum reflecting discussions about and/or understandings reached about the transfer of custody of the infant child, Julia Green, to her parents prior to the trial of the Defendant, which occurred on the 7th day of November, 1984, to which action of the Court the State objected and excepted.

Thereupon, counsel for Defendant moved the Court to continue Defendant's bail until the issue of whether a new trial should be awarded to the Defendant on newly discovered evidence, which motion for continued bail was objected to by the State and it is the opinion of the Court to grant said motion to continue bail for a period of forty-five (45) days from this date to permit the Court to review the records and documents of the Department of Human Services and thereafter notify counsel for the Defendant and counsel for the State whether an evidentiary hearing will be necessary on the issues raised by said motion.

Thereupon, the Court proceeded to consider the motion to reduce sentence pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure and

received into evidence letters written by the Defendant's children and upon receiving argument by counsel for the Defendant and counsel for the State, and upon the Defendant exercising her rights to allocution, the Court will reserve ruling on the motion to reduce sentence pending an opportunity to review the letters of the Defendant's children offered and accepted into evidence this day and it is the opinion of the Court to enter an Order regarding whether a new trial should be awarded and/or further hearings be held upon said motion for new trial and whether the Defendant's motion to reduce sentence should be granted and that a copy of said order will be provided to counsel for the Defendant and counsel for the State, notifying the Defendant of the Court's ruling.

The Clerk shall enter the foregoing as of the day and date first above written.

/s/ 25 Sem. 86

/s/ Fred Fox, II
THE HONORABLE FRED FOX, JUDGE

STATE OF WEST VIRGINIA

SIXTEENTH JUDICIAL CIRCUIT

24 September 1986

Steven M. Askin, Esq.
P. O. Box 1938
Martinsburg, WV 25401

Michael D. Thompson
Prosecuting Attorney
P. O. Box 729
Charles Town, WV 25414

RE: STATE V. McCLELLAN
CASE NOS. 84-F-58, 84-M-3

Gentlemen:

With regard to defendant's Motion for New Trial (on the ground of newly discovered evidence), I have received and reviewed copies of the entire Department of Human Services file regarding the "Stonegate" matter. I would estimate this file to contain approximately 1800-2000 pages, and my review consumed twenty-two (22) plus working hours between receipt of the file on 28 August 1986 and 23 September

1986. As one might imagine, the file contained a certain amount of repetition, and considerable material which did not have any bearing on the issue at hand. However, I did review the entire file.

Additionally, I have considered the matters raised at the hearing of this matter on 1 August 1986, and Mr. Askin's letter of 10 September 1986. I did not review the entire trial transcript as it was not available to me here in Fairmont; however, I recall the testimony which goes to the issue in question.

I found nowhere in the Department of Human Services file any indication that there was an "arrangement" concerning the return of Julie Green to the custody of her parents in return for the

parents' testimony for the State. Certainly during the period of the McClellan Trial (7 November 1984 through 9 November 1984) and prior thereto, the Greens, as well as most of the other Stonegate parents, were working with the Department toward regaining legal custody of their infant children. However, I found no evidence that the Department had even discussed with Stuart or Leslie Green their testimony as against the defendant, Dorothy McClellan, much less any arrangement, promise or commitment concerning same. There is no basis on which to believe that their denials of an arrangement were anything less than truthful. Accordingly, I find no newly discovered evidence which would warrant the granting of a new trial, and the Motion shall be denied.

With regard to the Motion to Reduce Sentence, I have considered the evidence adduced at the 1 August 1986 hearing, and the statements of defendant's children submitted in support thereof. I am still of the opinion that the sentence levied in this case was proper and warranted by the circumstances of the case. At that time of sentencing I stated: "I realize that a prison sentence will work a severe hardship on her (the defendant's) family and loved ones, who did nothing to deserve same. However, the violent death of a twenty-three month old baby, under the circumstances of this case, deserves nothing less than a penitentiary sentence." I am still of the same mind and will, therefore, deny the Motion to Reduce Sentence under Rule 35(b) of the West Virginia Rules of Criminal Procedure.

The State is requested to prepare an Order immediately reflecting these rulings and present same to opposing counsel for approval and forward same to me for entry. The Order shall further direct the defendant to surrender herself to the Sheriff of Jefferson County on or before 9:00 a.m., 15 October ±986, for incarceration and subsequent transfer to the State Penitentiary.

Very truly yours,

/s/ Fred L. Fox, II

Fred L. Fox, II

leg

ccs: Donald Giardini, Sheriff
of Jefferson County

court file (w/enclosures)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 7th day of November, 1986, the following order was made and entered, to-wit:

State of West Virginia, Plaintiff Below,

Respondent

vs.

Dorothy McClellan, Defendant Below,

Petitioner

On a former day, to-wit, October 21, 1986, came the petitioner, Dorothy McClellan, and presented to the Court her petition with exhibits, praying for an appeal from a judgment of the Circuit Court of Jefferson County rendered on the 24th day of September, 1986, as therein set forth. Upon consideration whereof, the Court is of opinion to and doth hereby order that this proceeding

should be, and the same is hereby, treated as a writ of habeas corpus, returnable to Jefferson County Circuit Court, for the purposes of permitting counsel to examine the Department of Human Services records.

It is further ordered that the Clerk of this Court is directed to promptly transmit by certified mail two copies of the petition filed in this office in this proceeding on October 21, 1986, together with copies of this order, to the Clerk of the Circuit Court of Jefferson County, Charles Town, West Virginia, for further proceedings in that Court, as provided in Chapter 53, Article 4A of the Code of West Virginia, as amended by Chapter 85, Acts of the Legislature, 1967.

A True Copy

Attest: _____
Clerk Supreme Court of Appeals

Supreme Court, U.S.
FILED
JAN 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-575

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DOROTHY McCLELLAN,
Petitioner,

v.

STATE OF WEST VIRGINIA,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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Counsel of Record for Petitioner

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Counsel for Petitioner

No. 86-575

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DOROTHY McCLELLAN,
Petitioner,

v.

STATE OF WEST VIRGINIA,
Respondent.

PETITIONER'S REPLY MEMORANDUM

The State of West Virginia, in its opposing brief in No. 86-575, argues that the Court lacks jurisdiction over this matter because the West Virginia Supreme Court of Appeals has granted petitioner's state writ of habeas corpus to the extent it has permitted petitioner's counsel to review certain agency records.

The fact that a defendant "might obtain release by a subsequent and distinct proceeding [such as habeas corpus] . . . does not affect the finality of the

existing judgment." Largent v. Texas, 318 U.S. 418, 421-22 (1943). See R. Stern, E. Gressman and S. Shapiro, Supreme Court Practice, 137 (6th ed. 1986). As required by Sup.Ct.R. 20.1 and 20.4, petitioner's petition for certiorari was filed upon the denial of her Motion for Reconsideration of the denial of her Petition for Appeal by the West Virginia Supreme Court of Appeals.[1] The state judgment is thus final.

If the Court were nevertheless to accept respondent's contention that a final judgment has not yet been entered, petitioner respectfully requests that the Court retain her petition until such time as her pending state habeas proceeding is concluded and the Court can consider the

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[1]Upon denial of petitioner's Motion for Reconsideration, petitioner was ordered to, and continues to, serve her prison sentence of one to five years.

crucial issues raised by petitioner on their merits.[2]

Respectfully submitted,

PHILIP J. HIRSCHKOP

Counsel of Record for
Petitioner Dorothy McClellan

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[2]Alternatively, petitioner would request leave to refile her petition for certiorari upon the completion of her state habeas proceeding.